No. 84-312-CFX
Status: GRANTED

Docketed:
August 28, 1984

Title: Donald J. Devine, Director, Office of Personnel Management, Petitioner
v.
NAACP Legal Defense and Educational Fund, Inc., et al.

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Feldman, Boris, Ralston, Charles Stephen, Cox, Mary Carolyn

Entry	Date	Note	Proceedings and Orders
1	Jul 13 1984		Application for extension of time to file petition and order granting same until August 28, 1984 (White, July 18, 1984).
2	Aug 28 1984	G	Petition for writ of certiorari filed.
3	Sep 27 1984	G	Motion of United Black Fund of America, et al. for leave to file a brief as amici curiae filed.
4	Oct 2 1984		Brief of respondents NAACP, et al. in opposition filed.
5	Oct 3 1984		DISTRIBUTED. October 26, 1984
6	Oct 16 1984	X	Reply brief of petitioner Devine, Dir., OPM filed.
7	Oct 29 1984		Motion of United Black Fund of America, et al. for leave to file a brief as amici curiae GRANTED. Justice Marshall OUT.
8	Oct 29 1984		Petition GRANTED. Justice Marshall OUT.
			**********
10	Dec 10 1984		Order extending time to file brief of petitioner on the merits until December 20, 1984.
11	Dec 21 1984		Lodging received. To be returned to Department of Justice, Room 5614.
12	Dec 21 1984		Joint appendix filed.
13	Dec 20 1984		Brief of petitioner Devine, Dir., OPM filed.
14	Dec 20 1984		Brief amicus curiae of United Black Fund of America, et al. filed.
15	Jan 4 1985		SET FOR ARGUMENT. Tuesday, February 19, 1985. (4th case.)
16	Jan 14 1985		Record filed.
17	Jan 21 1985		Brief of respondents NAACP, et al. filed.
18	Jan 21 1985		Brief amicus curiae of Natl. Comm. for Responsive Philanthropy, et al. filed.
19	Jan 19 1985		Brief amicus curiae of Planned Parenthood Federation of America filed.
20	Jan 21 1985		Brief amicus curiae of American Civil Liberties Union filed.
21	Jan 21 1985		LODGING by respondents (2 documents).
22	Jan 22 1985		CIRCULATED.
23	Jan 21 1985	X	Brief amicus curiae of New York filed.
24	Jan 21 1985		LODGINGS.
25	Jan 21 1985	X	Brief amicus curiae of American Jewish Committee, et al. filed.
26	Jan 25 1985	D	Motion of respondents to file appendix that does not comply with the Rules of the Court filed.

No. 84-312-CFX

Entry	Date	Note	Proceedings and Orders
27	Feb 1 1985		DISTRIBUTED. Feb. 15, 1985. (Above motion).
28	Feb 12 1985		Lodging received from the Solicitor General.
29	Feb 12 1985	X	Reply brief of petitioner Devine, Dir., OPM filed.
30	Feb 19 1985		Motion of responcents to file appendix that does not comply with the Rules of the Court DENIED. Justice Blackmun and Justice Stevens would grant this motion. Justice Marshall and Justice Powell OUT.
31	Feb 19 1985		ARGUED.

84-312

No.

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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether Executive Order No. 12,404, which limits participation in the Combined Federal Campaign to traditional health and welfare charities and thus excludes legal advocacy groups, violates the First Amendment.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Sierra Club Legal Defense Fund, Inc.; the Puerto Rican Legal Defense and Education Fund, Inc.; the Federally Employed Women Legal and Education Fund, Inc.; the Indian Law Resource Center; the Lawyers' Committee for Civil Rights Under Law; and the Natural Resources Defense Council, Inc. are respondents.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND,
INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Director of the Office of Personnel Management, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-76a) is reported at 727 F.2d 1247. The opinion of the district court (App., *infra*, 84a-97a) is reported at 567 F. Supp. 401.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 77a-78a) was entered on February 17, 1984. A petition for rehearing was denied on April 30, 1984 (App., *infra*, 79a-83a). On July 18, 1984, Justice White extended the time within which to file a petition for a writ

of certiorari to and including August 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

EXECUTIVE ORDER INVOLVED

Exec. Order No. 12,404, 3 C.F.R. 151, provides in pertinent part:

> By the authority vested in me as President * * * and in order to lessen the burdens of government and of local communities in meeting needs of human health and welfare, it is hereby ordered as follows:
>
> Section 1. Executive Order No. 12353 of March 23, 1982, is amended as follows:
>
> (a) By deleting Section 1 of that Order and inserting in its place the following provision:
>
> "Section 1. The Director of the Office of Personnel Management shall make arrangements for voluntary health and welfare agencies to solicit contributions from Federal employees and members of the uniformed services at their places of employment or duty. These arrangements shall take the form of an annual Combined Federal Campaign in which eligible voluntary agencies are authorized to take part."
>
> (b) In Section 2 insert "(a)" after the Section number and add the following new subsection after the existing provision:
>
> "(b) In establishing those criteria [for determining the eligibility of voluntary agencies that may participate in each of the annual Combined Federal Campaigns], the Director shall be guided by the following principles and policies:
>
> "(1) The objectives of the Combined Federal Campaign are to lessen the burdens of government and of local communities in meeting needs of human health and welfare; to provide a convenient channel through which Federal

> public servants may contribute to these efforts; to minimize or eliminate disruption of the Federal workplace and costs to Federal taxpayers that such fund-raising may entail; and to avoid the reality and appearance of the use of Federal resources in aid of fund-raising for political activity or advocacy of public policy, lobbying, or philanthropy of any kind that does not directly serve needs of human health and welfare.
>
> "(2) To meet these objectives, eligibility for participation in the Combined Federal Campaign shall be limited to voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families. * * * Such services must directly benefit human beings * * *. Such services must consist of care, research or education in the fields of human health or social adjustment and rehabilitation; relief of victims of natural disasters and other emergencies; or assistance to those who are impoverished and therefore in need of food, shelter, clothing, education, and basic human welfare services.
>
> "(3) Agencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves shall not be deemed charitable health and welfare agencies and shall not be eligible to participate in the Combined Federal Campaign.

STATEMENT

1. Background of the Combined Federal Campaign

Prior to 1957, there were no government-wide rules governing solicitation by charitable organizations in the federal workplace. In some federal facilities managers did not permit any solicitation; in others, there were no

restrictions, and solicitations occurred so frequently that they disrupted the workplace. App., *infra*, 3a. Federal officials in some facilities "were besieged by dozens of agencies seeking endorsements and the privilege of soliciting employees on the job." U.S. Civil Service Comm'n, *Manual on Fund-Raising Within the Federal Service for Voluntary Health and Welfare Organizations* § 1.1 (1977).[1]

In 1957, President Eisenhower promulgated procedures for a program of charitable solicitation in the federal workplace and established the President's Committee on Fund-Raising Within the Federal Service to review and modify the fund-raising program. Exec. Order No. 10,728, 3 C.F.R. 387 (1957). In 1961, President Kennedy abolished the Committee and directed the Chairman of the Civil Service Commission to "make arrangements for such national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate to solicit funds from Federal employees and members of the armed forces at their places of employment or duty stations."[2] Exec. Order No. 10,927, § 2(a), 3 C.F.R. 454 (1961). The program developed in response to this directive came to be known as the Combined Federal Campaign.

For the next 20 years, the provision for Campaign participation by "national voluntary health and welfare agencies and such other[s] * * * as may be appropri-

[1] Until recently the Campaign was governed by the provisions of the *Manual on Fund-Raising Within the Federal Service*, originally issued in 1963. In 1982, the Office of Personnel Management promulgated a comprehensive regulatory scheme, codified at 5 C.F.R. Pt. 950, implementing the executive orders governing the Campaign. See 47 Fed. Reg. 29496 (1982). These regulations were amended in 1983 and 1984. See 48 Fed. Reg. 29458 (1983); 49 Fed. Reg. 32735 (1984).

[2] These duties were transferred to the Director of the Office of Personnel Management when the Civil Service Commission was abolished in 1978.

ate" was understood by all concerned to limit participation to those charities that engaged in medical research or that provided traditional health and welfare services to needy people. C.A. App. 385-386.[3] This understanding was codified in the *Manual on Fund-Raising Within the Federal Service*, *supra*, § 5.21, which provided that participation in the Campaign was confined to charitable organizations "providing *direct services* to persons in the fields of health and welfare services" (emphasis supplied).

In 1980, several legal advocacy groups ("legal defense funds")[4] that had been denied the opportunity to partic-

[3] The Director of the Office of Personnel Management described the history of the Campaign as follows:

> Everyone seemed to understand that the Combined Federal Campaign was intended to support the traditional kinds of charities that undertake research into the causes and cures of dread diseases or that render health and welfare services directly to needy people. The world of not-for-profit organizations had always included many other kinds of groups and institutions, of course, ranging from private schools and universities to opera guilds, sports associations, recreation societies, and many more, including the newer "advocacy groups" such as legal defense funds and public policy research organizations, all of which number today in the many tens of thousands. But it had never been thought appropriate—and certainly not practical—for these kinds of institutions to participate in the Combined Federal Campaign, especially since they were not engaged in supplying health and welfare services directly to human beings who were ill, infirm, poor, or distressed, thereby lessening the burdens of government in meeting such needs.

Statement of Donald J. Devine before the Subcomm. on Manpower and Housing of the House Comm. on Government Operations, 98th Cong., 1st Sess. 3-4 (Mar. 24, 1983), reproduced at C.A. App. 385-386.

[4] We use the terms "legal advocacy groups" and "legal defense funds" to refer generally to organizations that provide legal services to clients based on whether the clients have a cause or claim that the legal defense funds wish to advance; the term

ipate in the Campaign challenged the "direct services" requirement. In *NAACP Legal Defense and Educational Fund, Inc.* v. *Campbell*, 504 F. Supp. 1365 (D.D.C. 1981), the court held that the "direct services" requirement was unconstitutionally vague and could not be used as a basis for excluding organizations from participation in the Campaign.

Following the ruling in *Campbell*, the Office of Personnel Management concluded that it was obliged to allow a variety of groups, including respondents, to participate in the Campaign, at least until more precise guidelines for participation could be developed.[5] This change in the traditional scope of the Campaign brought a number of complaints that the Campaign was being politicized, as well as open resistance to the Campaign in some quarters. For example, in 1982 a number of federal employee unions threatened to boycott the Campaign; in some cases those threats were carried out. App., *infra*, 7a-10a, 63a-66a.[6]

"legal aid societies" refers to organizations that make legal services available to clients on the basis of financial need, without distinguishing on the basis of a particular cause. See C.A. App. 433; 5 C.F.R. 950.101(a)(1)(i)(H).

[5] In addition to respondents in this case, new participants in the Campaign included, inter alia, the Conservative Legal Defense and Education Fund, the National Right to Work Legal Defense Foundation, the Center for Auto Safety, and the National Organization for Women Legal Defense and Education Fund. See C.A. App. 550-551.

[6] See also, *e.g.*, 48 Fed. Reg. 29458 (1983); *Executive Orders 12353 and 12404 As They Regulate the Combined Federal Campaign (Part 1): Hearing Before a Subcomm. of the House Comm. on Government Operations*, 98th Cong., 1st Sess. 69-70 (1983) (statement of Donald J. Devine), reproduced at C.A. App. 400-402.

2. Structure and Operation of the Campaign Under Executive Order No. 12,404[7]

In February 1983, President Reagan issued Exec. Order No. 12,404, 3 C.F.R. 151.[8] The new executive order represented an attempt to cure the vagueness condemned by the district court in *NAACP Legal Defense and Educational Fund, Inc.* v. *Campbell*, *supra*, and to return the Campaign to its original scope. Section 1(b) of Exec. Order No. 12,404 specifies that the Campaign is to be conducted for the benefit only of those organizations dedicated to providing:

> (1) care, research or education in the fields of human health or social adjustment and rehabilitation;
>
> (2) relief of victims of natural disasters and other emergencies; or
>
> (3) assistance to those who are impoverished and therefore in need of food, shelter, clothing, education, and basic human welfare services.

Organizations that do not provide or support such services, including those "that seek to influence the outcomes of elections or the determination of public policy

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[7] The description of the operation of the Campaign here and at later points in the petition reflects the regulatory scheme promulgated by the Office of Personnel Management in 1983 to implement Exec. Order No. 12,404. OPM recently revised those regulations in an effort to comply with the decisions below pending further review. See 49 Fed. Reg. 32735 (1984). The new regulations change both the eligibility criteria (which are at issue in this case) and certain operational features of the Campaign, so that the Campaign may proceed in the fall of 1984. The preamble to the new regulations states that they are issued "without prejudice to [OPM's] right or duty further to modify the rules in the event of a supervening direction from a court, the Congress, or the President." *Id.* at 32735.

[8] Exec. Order No. 12,404 amended Exec. Order No. 12,353, 3 C.F.R. 139 (1982), which replaced the 1961 order establishing the Campaign. Exec. Order No. 12,353 retained the original criteria for participation in the Campaign.

through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves," are not eligible to receive contributions through the Campaign.

The executive order explains that the purposes of the Campaign, and the rationale for the eligibility criteria, are to: (1) lessen the burdens of the federal government and local communities in supplying health and welfare services; (2) minimize disruption to the federal workplace and costs of fund-raising; and (3) avoid the fact and appearance of governmental support for organizations that advocate partisan political viewpoints and causes. Exec. Order No. 12,404, § 1(b).

The government annually solicits more than $100 million in contributions from civilian and military employees through the Campaign. The Campaign is conducted by volunteer federal employees, in the federal workplace, on government time, and at government expense. 5 C.F.R. 950.103(d) and (e). All supervisory and oversight personnel for the Campaign are federal officials. 5 C.F.R. 950.103(c) and (d), 950.201 *et seq*. The Director of the Office of Personnel Management or his delegate makes all policy, procedural, and eligibility decisions for the Campaign. Exec. Order No. 12,353; 5 C.F.R. 950.201(a). The charities that receive contributions through the Campaign are barred by regulation from themselves engaging in any on-the-job solicitation of federal employees. See 5 C.F.R. 950.507(a).

Federal employees distribute to their colleagues pledge cards and copies of a contributor's leaflet, which contains a list of participating charities and brief, 30-word statements about the nature of each charity's program. 5 C.F.R. 950.521. These materials are "developed in the local area under direction of the local Federal [officials conducting the Campaign]" and cannot be used without the approval of those officials. 5 C.F.R. 950.521(a). Federal employees may donate lump sums

or may request that specified amounts be withheld from their salaries under a government payroll deduction plan. Employees may designate one or more of the organizations listed in the contributor's leaflet to receive their contributions. Undesignated contributions are paid to a private umbrella organization that takes responsibility for distributing those funds to other organizations participating in the Campaign. 5 C.F.R. 950.509(e) and (g), 950.513, 950.519(d), 950.523. See App., *infra*, 88a.[9] Only designated contributions are at issue in this case at this stage of the proceedings.

3. **Proceedings in this Case**

a. Following the issuance of Exec. Order No. 12,404, respondents, seven legal defense funds, brought this action in the United States District Court for the District of Columbia. Respondents contended that their First and Fifth Amendment rights would be violated if participation in the Campaign were limited to traditional health and welfare charities in accordance with Exec. Order No. 12,404.

The district court permanently enjoined the government from excluding respondents from eligibility to receive designated contributions through the Campaign (App., *infra*, 84a-99a). Applying *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37 (1983), the court held that, "to the extent that it permits numerous charitable organizations to present their

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[9] The umbrella organization, known as the Principal Combined Fund Organization (PCFO), is usually a United Way affiliate. The PCFO provides administrative support services to the federal officials charged with conducting the Campaign. Exec. Order No. 12,353, § 5; 5 C.F.R. 950.211(e). It may be responsible for accounting for amounts pledged and disbursement to designated oganizations, as well as printing and preparation of informational materials. 5 C.F.R. 950.509(e) and (h), 950.521. The PCFO does not engage in direct solicitation of funds from employees.

messages to federal employees," the Campaign constitutes a "limited public forum" subject to First Amendment constraints (App., *infra*, 90a). The court characterized the restrictions on participation in the Campaign as a content-based prohibition (*id.* at 91a) and concluded that the reasons set forth in Exec. Order No. 12,404 for those restrictions were insufficient to justify exclusion of respondents from eligibility to receive designated contributions through the Campaign (App., *infra*, 92a-94a).[10]

b. A divided panel of the court of appeals affirmed (App., *infra*, 1a-76a). Judge Edwards, writing for the majority, found it unnecessary to decide whether the Campaign constituted a "limited public forum" or a "nonpublic forum" under *Perry Education Assn.* because the court concluded that exclusion of respondents did not satisfy even the reasonableness standard applicable to measures restricting speech in nonpublic forums (App., *infra*, 16a-20a).[11] The court asserted that it was necessary to examine carefully the government's justification for restricting participation in the Campaign because, in the court's view, there was no difference in "status" between the excluded organizations and those that participate in the Campaign. In support of this conclusion, the court noted, inter alia, that respondents qualified as charitable organizations under the Internal Revenue Code. *Id.* at 20a-24a.

[10] The district court determined that respondents' claim that they should not be excluded from receipt of undesignated contributions received in the Campaign appeared to be more appropriately subject to equal protection analysis than to First Amendment review. It concluded, however, that consideration of this issue would be premature because final regulations implementing Exec. Order No. 12,404 had not yet been promulgated. The court therefore dismissed the claim of access to undesignated funds without prejudice. App., *infra*, 89a, 95a.

[11] Judge Wright would have found that the Campaign constituted a limited public forum and that the First Amendment requirements applicable to such a forum were not satisfied (App., *infra*, 42a).

The court of appeals rejected the government's explanation that limitation of participation in the Campaign to traditional health and welfare charities would decrease the burden on the government to provide such services (App., *infra*, 24a-25a). The court found it significant that groups like the United States Olympic Committee had been allowed to participate in the Campaign; and it noted that the litigation efforts of one respondent had resulted in benefits to needy people (*ibid.*).

The court of appeals also rejected the government's explanation that advocacy, litigation, and lobbying groups were excluded from the Campaign in order to avoid the appearance of government support for partisan causes (App., *infra*, 25a-27a). The court observed that legal defense funds were not considered to be political action groups for purposes of the Internal Revenue Code (App., *infra*, 25a-26a). The court expressed doubt that legal defense funds could constitutionally be excluded on the ground that their controversial nature might result in disruption of the workplace and pose a danger to the fund-raising purposes of the Campaign (*id.* at 28a-31a). In addition, the court found no "tangible evidence in the record suggesting that some real and serious disruptions of the workplace will likely occur" (*id.* at 32a).

Finally, the court of appeals rejected the government's suggestion that without eligibility limitations the government would be inundated with philanthropic organizations seeking to participate in the Campaign (App., *infra*, 35a-36a). The court further concluded that the availability to respondents of alternative means of communication with federal employees was essentially irrelevant to analysis of the reasonableness of the Campaign limitations (*id.* at 36a-37a). The court

ended by criticizing the dissenting opinion for, inter alia, applying a "rational basis test," rather than a reasonableness test (*id.* at 38a-39a).

Judge Starr dissented (App., *infra*, 43a-76a). In his view, because this case involved a nonpublic forum, the majority had employed "a stringent standard of review under the guise of a 'reasonableness test' that comports not at all with the deferential standard demanded by Supreme Court precedent" (*id.* at 44a). Judge Starr noted that there was ample record evidence that inclusion of the legal advocacy groups had caused losses during the 1983 Campaign and had threatened the future success of the Campaign (*id.* at 62a-66a). He stated that the limitations on Campaign participation articulated in Exec. Order No. 12,404 constituted a reasonable means of minimizing disruption in the federal workplace and avoiding the appearance of governmental favoritism toward advocacy groups (*id.* at 66a-70a). Accordingly, Judge Starr concluded that limitation of participation in the Campaign to traditional health and welfare charities was constitutional because it was both reasonable and viewpoint-neutral.

c. The court of appeals denied the government's suggestion for rehearing en banc by a vote of four to four (App., *infra*, 80a-83a).[12] Judge Starr, joined by Judges Wilkey, Bork, and Scalia, filed a dissenting statement. The dissenters noted that the panel's invocation of tax exempt status as the linchpin of its analysis would make it "difficult, if not impossible, for the federal government to exclude on a principled basis any of the hundreds of thousands of organizations across the country that enjoy [such] status" (App., *infra*, 82a). They concluded that en banc consideration was warranted "because of the enormous potential impact of this case on

[12] Chief Judge Robinson and Judges Wald and Mikva did not participate in consideration of the rehearing petition. See App., *infra*, 81a.

the [Campaign]; because of its critical misinterpretation of important First Amendment doctrine; and because of its misapplication of the standard for affirming the grant of summary judgment on appeal" (*id.* at 82a-83a).

REASONS FOR GRANTING THE PETITION

Through six different Administrations, beginning in 1961 with the Kennedy Administration, the federal government (like many private employers that sponsor charitable drives in the workplace) has limited participation in the Combined Federal Campaign to traditional health and welfare charities. In this case, however, the court of appeals ruled on First Amendment grounds that the President may not impose such a limitation.

The four judges who voted in favor of en banc consideration correctly noted that the court of appeals' holding rests on a "critical misinterpretation of important First Amendment doctrine" (App., *infra*, 83a). Moreover, the decision below creates serious practical problems for administration of the Campaign and fundamentally alters the nature of this major federal activity. The court of appeals' application of a stringent standard of review of restrictions on access to nonpublic forums is likely to cause difficulties for the government in other contexts as well. Review by this Court is plainly warranted.

1. The court of appeals' holding that the President may not limit the scope of the Campaign in a way that excludes legal advocacy groups from receipt of designated contributions rests on a serious misreading of this Court's First Amendment precedents. Indeed, as Judges Starr, Wilkey, Bork, and Scalia noted (App., *infra*, 82a), the decision below amounts to an unprecedented "transformation of the public forum doctrine in First Amendment analysis."

a. The court of appeals purported to analyze this case within the framework of this Court's "forum" decisions, particularly *Perry Education Assn.* v. *Perry Lo-*

cal Educators' Assn., 460 U.S. 37 (1983). In *Perry Education Assn.* the Court explained (*id.* at 44) that the standard by which limitations on access to public property must be evaluated differs depending on the character of the property.[13]

To the extent this can properly be regarded as a "forum" case,[14] the court of appeals was plainly correct in

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[13] The Court in *Perry Education Assn.* described three categories of cases involving the claimed right of access to public property for purposes of expression. First, in "places which by long tradition or by government fiat have been devoted to assembly and debate," such as public streets and parks, the government may enforce a "content-based exclusion" only if it serves a compelling state interest and is narrowly drawn to achieve that end (460 U.S. at 45). The government may also enforce time, place and manner regulations that "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication" (*ibid.*).

The second category of cases involves public property that was not traditionally recognized as a public forum but that the government, at least for the time being, "has opened for use by the public as a place for expressive activity" (460 U.S. at 45). In order to fall into this category, public property need not be opened to all segments of the public for all types of expression (*id.* at 46 n.7). A constitutional right of access extends "only to other entities of similar character" (*id.* at 48). University meeting facilities, school board meetings, and municipal theaters are within this "limited public forum" category (*id.* at 45-46). In cases of this type, as long as the open character of the facility is retained, the government "is bound by the same standards as apply in a traditional public forum" (*id.* at 46).

The third category involves "[p]ublic property which is not by tradition or designation a forum for public communication" (460 U.S. at 46). "In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view" (*ibid.*).

[14] We have some doubt whether either the federal workplace or the Campaign is properly described as a "forum." The federal

assuming that it fell within the third category of cases mentioned by this Court in *Perry*—those involving nonpublic forums. Neither the federal workplace nor the Campaign itself has ever been "open for use by the general public" (*Perry*, 460 U.S. at 47). See also *Minnesota Board for Community Colleges* v. *Knight*, No. 82-898 (Feb. 21, 1984), slip op. 9; *Greer* v. *Spock*, 424 U.S. 828, 838 (1976) (noting that federal military reservations have not traditionally served as "a place for free public assembly and communication of thoughts by private citizens"). The federal government, acting in

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workplace, like any place of employment, does not exist to provide an outlet for expressive activity; rather, its purpose is to get the employer's work done. Cf. *Connick* v. *Myers*, No. 81-1251 (Apr. 20, 1983), slip op. 12. Charities are not permitted to send their representatives into the federal workplace. The Campaign itself also does not exist to provide a forum for expression by charities. It is the government that sponsors and operates the Campaign—a role that gives the President a special interest in defining the scope of the Campaign.

Moreover, participating charities communicate only indirectly with employees, by providing short descriptions of their work, which may be edited by federal officials. This Court has recognized that direct charitable solicitation constitutes expression that is protected by the First Amendment. See *Secretary of State* v. *Joseph H. Munson Co.* No. 82-766 (June 26, 1984); *Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). But the indirect and limited communication by organizations that participate in the Campaign is quite different from the sort of charitable solicitation that is "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues." *Village of Schaumburg*, 444 U.S. at 632.

Of course, if this case were not subject to First Amendment "forum" analysis, the restrictions on Campaign participation would still be subject to an inquiry into whether the distinction the President has drawn violates the right to equal protection of the laws. Cf. *Regan* v. *Taxation With Representation*, No. 81-2338 (May 23, 1983).

its capacity as employer, has a strong interest in controlling activities in the workplace where the Campaign takes place. Cf. *Connick* v. *Myers*, No. 81-1251 (Apr. 20, 1983), slip op. 12. Indeed, the impetus for establishment of the Campaign was not the desire to provide a forum for expressive activity; rather, it was the need to minimize the disruption to the federal workplace that had resulted from an ad hoc charitable solicitation policy. From the outset, federal officials have directed the Campaign, and federal employees have been responsible for direct solicitation; the charities themselves are not permitted to send representatives into the federal workplace.

Because it was willing to assume that this case involved a nonpublic forum, the court of appeals should have evaluated the limitation on Campaign participation according to whether it "is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view" (*Perry Education Assn.*, 460 U.S. at 46). As Judge Starr noted (App., *infra*, 44a, 56a-59a), this Court, in undertaking the "reasonableness" inquiry, has accorded considerable deference to the judgment of government officials concerning the need for restrictions in nonpublic forums.[15] But although the court of appeals invoked the *Perry* "reasonableness" standard, in fact it applied a far greater level of scrutiny. Indeed, the court itself con-

[15] For example, in *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119 (1977), the Court did not attempt to second guess prison officials' predictions about the likelihood of disruption resulting from prison union activities; and in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), the plurality deferred to the judgment of City officials that a policy of excluding political advertising on public transit vehicles would minimize chances of abuse, the appearance of favoritism, and the risk of imposing on a captive audience. And see, *e.g.*, Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 Stan. L. Rev. 121, 127-131 (1982).

firmed its departure from this Court's precedents when it sharply distinguished what it viewed as the proper standard from what it termed the "rational basis" test applied by the dissent. See App., *infra*, 38a.[16]

[16] The court of appeals' redefinition of "reasonableness" to signify a standard far more stringent than a rational basis test is directly contrary to the Court's statement in *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. at 134 (emphasis added):

> A prison may be no more easily converted into a public forum than a military base. Thus appellants need only demonstrate a *rational basis* for their distinctions between organizational groups.

The court of appeals appears to have justified its heightened scrutiny largely on the basis of its finding that respondents were similarly situated to other organizations that participate in the Campaign. See App., *infra*, 20a-24a. We disagree with that finding; it is particularly objectionable in view of the fact that this case was decided on respondents' motion for summary judgment.

The court of appeals noted (App., *infra*, 21a) that both respondents and the organizations that participate in the Campaign were tax exempt for purposes of the Internal Revenue Code and therefore were not engaged in political activities inconsistent with that status. But organizations that have tax exempt status are by no means uniform in terms of the types of services they perform; and the purposes of tax exemption are different from the purposes of the Campaign. Moreover, as Judge Starr correctly noted (App., *infra*, 59a), this Court has never insisted that groups that are excluded from a nonpublic forum must have a different "status" from those admitted to the forum.

The court of appeals also asserted (App., *infra*, 22a) that respondents "provide or support direct health and welfare services to individuals or their families" (Exec. Order No. 12,404, § 1(b)) at least as effectively as organizations that had been found to qualify for participation in the Campaign, *e.g.*, the National Parks and Conservation Association and the United States Olympic Committee. Because respondents did not call attention to the inclusion of the latter organizations at the district court stage, there is nothing in the record that indicates what evidence the organizations presented to convince federal officials that they met the direct health and welfare services crite-

b. The court of appeals' misapplication of the *Perry* standard led it to reject each of the President's stated reasons for limiting participation in the Campaign to traditional health and welfare charities. But that limitation is clearly reasonable, and it contributes significantly to the success of the Campaign. The distinction between traditional health and welfare charities and other organizations is not illogical or difficult to grasp. Cf. *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 635 (1980). Most people would perceive some difference between traditional charities that render services to the needy or the sick (*e.g.*, the American Red Cross), on the one hand, and legal defense funds and other advocacy groups, on the other; there is at least likely to be a greater consensus that the goals of the former are worthwhile.

Even the court of appeals recognized (App., *infra*, 35a) that it may be necessary for the government to draw a line somewhere in order to confine the Campaign to a manageable scope. The President chose to define eligibility in the way that had proved to be successful in practice for 20 years following initiation of the Campaign. As Judge Starr noted (*id.* at 51a-52a), private employers commonly limit on-the-job charitable solicitation drives to traditional charities. See, *e.g.*, *Serv-Air, Inc.* v. *NLRB*, 395 F.2d 557, 560 (10th Cir.), cert. denied, 393 U.S. 840 (1968). The federal government, acting in its capacity as employer, should be free to do likewise.

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rion. (If the government had had occasion to submit such evidence, it would have shown, *e.g.*, that the United States Olympic Committee advised federal officials that it encourages and supports, inter alia, research in medicine and safety, as well as amateur athletics among the handicapped and minorities.) Even if inclusion of the organizations cited by the court of appeals resulted from misapplication of the direct health and welfare services criterion, that would not affect the validity of the criterion itself, which is the issue in this case.

Exec. Order No. 12,404 sets out the purposes of the Campaign: lessening the burden of government and local communities in meeting human health and welfare needs, minimizing disruption of the federal workplace and costs of fund-raising, and avoiding the reality and appearance of using federal resources to advance the cause of political activity or advocacy. Each of these purposes provides a rational basis for the President's decision to limit the Campaign to traditional health and welfare charities.

The court of appeals did not reject the proposition that the government has a significant interest in reducing the level of public funds that must be directed to various social programs by maximizing the amount of support for similar private activities. The court nevertheless termed "patently ludicrous" the government's use of this consideration as a basis for restricting the scope of the Campaign (App., *infra*, 24a), because, in the court's judgment, the efforts of respondents benefit the needy and society in general as much as the efforts of organizations included in the Campaign. But the President surely may rationally conclude, in Judge Starr's words, that "in general a dollar given to a traditional health and welfare charity will more certainly aid the needy than a dollar given to an advocacy group" (App., *infra*, 67a n.39). Cf. *Regan* v. *Taxation With Representation*, No. 81-2338 (May 23, 1983), slip op. 8.

Limiting Campaign participation to traditional health and welfare charities also serves to minimize disruption of the federal workplace and costs of fund-raising, as well as to maximize the success of the Campaign. Although it seems self-evident that the government has a strong interest in avoiding disruption and ensuring the success of the Campaign, the court of appeals found it "extremely disturbing" that the government might choose to structure the Campaign in a manner that would minimize employee protests (App., *infra*, 28a).

The court found "no plausible reason to suspect that the limited and unobtrusive communications at issue will in any way interfere with the normal activities in the workplace" and therefore declined to defer to what it referred to as "the fanciful—and somewhat specious—speculations" of the government on this subject (*id.* at 32a). The court also discounted the government's contention that inclusion of legal advocacy groups would threaten the fund-raising ability of the Campaign (*id.* at 33a-34a).

The court of appeals' approach is at odds with the Court's recognition in several nonpublic forum cases[17] that the government may have an interest in excluding expressive activity that is controversial or that threatens the success of some governmental venture. In such cases the Court has not required government officials to produce evidence in support of their predictions about the likely effect of controversial speech. See *Perry Education Assn.*, 460 U.S. at 52 n.12.

The court of appeals' failure to defer to the President's judgment concerning the disruption that could result from including legal advocacy groups in the Campaign is particularly egregious in view of the record in

[17] See *Perry Education Assn.*, 460 U.S. at 52 (exclusion of rival union from school mail system helps preserve labor peace within the schools); *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981) (prohibition on deposit of unstamped mailable matter in letterboxes helps protect postal revenues); *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. at 132-133 (prison officials' judgment about likelihood of disruption warrants restrictions on prison union activities); *Lehman* v. *City of Shaker Heights*, 418 U.S. at 304 (exclusion of political advertising on public transit vehicles helps to avoid jeopardizing revenues to the City). The Court has emphasized that the crucial question is whether a restriction on access is "reasonable in light of the purpose which the forum at issue serves." *Perry Education Assn.*, 460 U.S. at 49.

this case, which confirms those judgments. Following the decision in *NAACP Legal Defense and Educational Fund, Inc.* v. *Campbell*, 504 F. Supp. 1365 (D.D.C. 1981) (see page 6, *supra*), federal officials concluded that they were required for the time being to include legal advocacy groups in the Campaign. Judge Starr correctly noted (App., *infra*, 63a) that "inclusion of the advocacy groups caused both specific losses in the 1983 campaign and threatened the success of the charitable campaign in the years to come." The record contains numerous letters (some of which are cited or reproduced in Judge Starr's opinion, see *id.* at 63a-66a, 68a-70a, 73a-76a) in which employees, union officials, local Campaign officials, and traditional beneficiaries of the Campaign protested (some in quite vehement terms) the inclusion of advocacy groups; a number of employees indicated that they would not be willing to contribute to the Campaign unless it were returned to its traditional scope.[18] Some federal employee unions urged employees to boycott the 1983 Campaign because of the inclusion of the National Right to Work Legal Defense Foundation. At least one union boycotted the Campaign on a nationwide basis; others desisted only after federal officials represented that the Campaign would return to its traditional scope in the future. See App., *infra*, 63a-64a.[19] Even Members of Congress wrote to protest the inclusion of advocacy, litigation, and lobbying groups in the Campaign.[20]

The court of appeals agreed that the third justification offered by the government—avoiding the reality and appearance of using federal resources to advance the cause of political activity or advocacy—is a legiti-

[18] See C.A. App. 356, 358-361, 364-369, 373-380, 468, 470-473, 475-507.

[19] See also C.A. App. 361, 473, 476, 478-479, 482-484, 486, 487, 489-492, 494.

[20] See C.A. App. 362-363, 371-372.

mate governmental interest,[21] but it disagreed with the President's judgment that exclusion of legal advocacy groups from the Campaign would advance that interest. In the court's view, the tax exempt status of the funds indicated that they were not engaged in political advocacy (App., *infra*, 25a-26a). But the perception that inclusion in the Campaign of a group like the National Right to Work Legal Defense Foundation is motivated by politics will not be dispelled merely by the fact that the organization is tax exempt. Both common sense and the record in this case support the President's view that inclusion of legal defense funds in the Campaign is likely to be perceived as politically motivated.[22] There is no good reason for the court of appeals' failure to defer to the judgment of the President on this point.[23]

Finally, limitation of participation in the Campaign to traditional health and welfare charities is reasonable because alternative channels of communication (*i.e.*, solicitation of federal employees outside the workplace)

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[21] This Court has recognized the strong interest in preserving neutrality and the appearance of neutrality in the federal workplace in the Hatch Act cases. See *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 563-564 (1973). And in *Lehman* v. *City of Shaker Heights*, 418 U.S. at 305, and *Greer* v. *Spock*, 424 U.S. at 839, the Court concluded that the desire to avoid any appearance of favoritism or entanglement with political activity would justify restrictions on expressive activity in nonpublic forums.

[22] See, *e.g.*, the statement of the AFL-CIO in response to the inclusion in the Campaign of the National Right to Work Legal Defense Foundation: "The Reagan Administration has granted yet another opportunity to the far right wing to enrich itself, this time at the expense of federal and postal employees and the needy" (C.A. App. 96). See also App., *infra*, 68a-69a.

[23] Deference is particularly appropriate in view of the posture of this case. Since the case was decided on respondents' motion for summary judgment, evidence relating to the reasonableness of restrictions on Campaign participation should be viewed in the light most favorable to the government.

are available to organizations that do not participate in the Campaign. The court of appeals asserted, without citation of authority, that "the availability of alternative forums has never been considered to justify Government attempts to 'pick and choose' among preferred speakers" (App., *infra*, 36a). But this Court has made clear that the availability of such alternatives *is* relevant to a determination of the reasonableness of a restriction on expression in a nonpublic forum. See, *e.g.*, *Perry Education Assn.*, 460 U.S. at 53-54; *Greer* v. *Spock*, 424 U.S. at 839.[24]

2. The court of appeals' decision creates substantial practical difficulties for federal officials. It is undisputed that the Campaign serves a significant governmental purpose. See pages 3-4, *supra* (describing the chaotic situation with respect to charitable solicitation in the federal workplace prior to establishment of the Campaign). For a period of 20 years, the Campaign provided an efficient and effective mechanism through which federal employees made charitable contributions through the federal workplace. The Campaign has been an important source of assistance to traditional health and welfare charities, many of which depend heavily on the Campaign for funding of their services. See, *e.g.*, C.A. App. 381, 485.

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[24] The panel majority did not reach the second part of the *Perry* standard for nonpublic forums—whether a restriction is based on public officials' opposition to the speaker's view. The limitations on Campaign participation at issue here do not reflect any attempt to differentiate among organizations on the basis of their political or philosophical leanings; indeed, the groups that would be excluded from the Campaign span a wide range of views (see page 6 note 5 *supra*). In response to the suggestion that Exec. Order No. 12,404 discriminates against groups that advocate use of litigation to achieve their goals, Judge Starr correctly noted (App., *infra*, 71a) that litigation is properly regarded not as a viewpoint, but merely as a means of promoting a viewpoint.

The decision below requires a significant change in the nature of the Campaign. On its face the decision mandates only that respondents in this case be included in the Campaign. But as the judges dissenting from the denial of rehearing en banc recognized, the court's reasoning sweeps much more broadly. In support of its assertion that respondents were similarly situated to organizations included in the Campaign, the court of appeals stressed that both types of organizations qualified for tax exemption under the Internal Revenue Code (App., *infra*, 21a). Under that reasoning, any tax exempt organization, presumably including churches, schools, and a variety of other groups, could claim a constitutional right to be included in the Campaign.[25] Rather than itself determining the scope of the charitable drive it sponsors, as would a private employer, the federal government would assume the role of publicity and collection agent for all tax exempt organizations.

Moreover, the court of appeals' holding threatens the efficacy, and perhaps the very existence, of the Campaign. As we discussed in the preceding section, inclusion of advocacy, litigation, and lobbying groups in recent Campaigns (in compliance with court orders) has caused many federal employees to become seriously disenchanted with the Campaign and has led to threatened and actual boycotts of the Campaign. In view of this experience, it seems clear that implementation of the decision below will result in a significant decrease in the success of the Campaign; it may also create morale problems and divert some federal employees from their

[25] The 1983 *Annual Report of the Commissioner of Internal Revenue and the Chief Counsel for the Internal Revenue Service*, at 64, Table 20, states that over 300,000 organizations are listed as tax exempt under 26 U.S.C. 501(c)(3). (This figure does not include churches, which need not apply for an exemption.)

normal duties.[26] Officials who implement the decision below are again likely to be perceived as attempting to politicize the Campaign. And under the decision below Congress itself would be powerless to remedy the situation by enacting legislation authorizing conduct of the Campaign in the form it existed during the two decades after it was created by President Kennedy.

3. As harmful as the court of appeals' decision may be to the Campaign, we believe it is likely to create even greater problems in other areas. The court adopted a particularly demanding standard for measuring the reasonableness of government line-drawing with respect to nonpublic forums. Future application of that standard could impede the government's ability to engage in a variety of activities. The government could face First Amendment challenges to distinctions it draws with respect to who may have access to federal buildings, military bases, agency meetings, government publications, activities within federal institutions (*e.g.*, prisons, hospitals), and so on. Under the decision below, even if the government can show that a nonpublic forum is involved, its determinations concerning access will be subjected to exacting scrutiny that allows courts to second guess the judgment of federal officials about the need for restrictions. Since challenges to federal agency actions are frequently brought in the District of Columbia, the First Amendment standard adopted by the court of appeals in this case could cause serious practical difficulties for the government in a wide variety of contexts.

[26] The court of appeals' suggestion (App., *infra*, 32a) that the government may discipline federal employees who engage in Campaign-related disruption that impairs efficiency misses the point. The government's interest lies in *avoiding* situations that give rise to the need for discipline.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1984

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1822

NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., ET AL.

v.

DONALD J. DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, APPELLANT

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 83-0928)

Argued November 17, 1983

Decided February 17, 1984

Before WRIGHT, EDWARDS, and STARR, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

Dissenting Opinion filed by *Circuit Judge* STARR.

EDWARDS, *Circuit Judge*: Charitable solicitation of Federal employees or military personnel at their workplaces or duty stations is conducted exclusively through an annual fund raising drive called the Combined Federal Campaign (the "CFC" or the "campaign"). On February 10, 1983, the Government issued an executive order excluding legal defense funds from future participation in CFCs. *See* Exec. Order No. 12,404, 48 Fed. Reg. 6,685 (1983). The NAACP Legal Defense and Educational Fund, Inc. ("NAACP LDF") and six other legal defense funds,[1] all recognized by the Government as lawful charitable organizations, brought suit arguing that the decision to exclude them from the CFC violated their First and Fifth Amendment rights. The District Court agreed and, by summary judgment, permanently enjoined Donald Devine, Director of the Office of Personnel Management ("OPM"), from excluding the appellees from

[1] The other appellees in this action are: The Sierra Club Legal Defense Fund, Inc.; Puerto Rican Legal Defense and Education Fund, Inc.; Federally Employed Women Legal and Education Fund, Inc.; Indian Law Resources Center; The Lawyers' Committee for Civil Rights Under Law; and The Natural Resources Defense Council, Inc.

participating in CFCs on the basis of Executive Order 12,404.

Because we find the exclusion of LDFs from the CFC to be patently capricious and unreasonable, we agree with the result reached by the District Court. We therefore affirm.

I. BACKGROUND

A. *The Combined Federal Campaign*

As the appellant has previously acknowledged, "[i]t has been long-standing policy of the Federal Government to cooperate with and assist voluntary health and welfare agencies in soliciting funds for worthy causes from Federal personnel." Memorandum from Donald J. Devine to David A. Stockman 1 (Oct. 22, 1981) (hereinafter "Devine Memo II"), *reprinted in* I Joint Appendix 70 (hereinafter "J.A."). Prior to the creation of the CFC, this policy was implemented essentially in an ad hoc manner: "[t]he heads of some Federal facilities permitted no solicitations whatsoever; at other Federal worksites, no restrictions were imposed, and it was not uncommon for a collection to be taken up each week on behalf of one charity or another." *Hearings Before the Subcomm. on Manpower and Housing of the House Comm. on Governmental Operations* 29 (1983) (statement of Donald J. Devine) (hereinafter "Devine testimony"), *reprinted in* II J.A. 397.

The early haphazard approaches to solicitations for charitable causes proved to be largely unsatisfactory. Charities "could not understand why they were allowed to solicit in some Federal establishments and not in others, nor did they appreciate the fact that some charities seemed to have the support of Federal management" while others did not. *Id.* Federal employees were sometimes confused or upset at being subjected to repeated solicitations. *Id.* The situation created an "intolerable administrative burden for Federal officials," Devine

Memo II, *supra*, at 1, *reprinted in* I J.A. 70, as well as "an increasingly chaotic situation in Federal offices." Memorandum from Donald J. Devine to Craig L. Fuller 2 (Feb. 2, 1983) (hereinafter "Devine Memo III"), *reprinted in* I J.A. 107.

In 1961, "in order to control and simplify the process of charitable solicitation in the Federal workplace," President Kennedy created the CFC. *Id.* He "directed that all ad hoc solicitations be ended, and that worthy charities be permitted to solicit in the Federal workplace through a single, annual drive combining all participating [charitable] agencies." Devine testimony, *supra*, at 29-30, *reprinted in* II J.A. 397-98. To implement this plan, President Kennedy issued Executive Order 10,927, instructing that arrangements be made "for such national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate to solicit funds from Federal employees and members of the armed forces at their places of employment or duty stations." Exec. Order No. 10,927, § 2(a), 3 C.F.R. 454 (1959-1963 Compilation).

The mechanics of the CFC have been described at length in other judicial opinions, *see NAACP Legal Defense and Educational Fund, Inc. v. Devine*, 560 F. Supp. 667 (D.D.C. 1983) (*"NAACP LDF II"*); *NAACP Legal Defense and Educational Fund, Inc. v. Campbell*, 504 F. Supp. 1365 (D.D.C. 1981) (*"NAACP I"*); therefore, we will highlight only those features that are necessary to understand the dispute at hand. The CFC is governed by the Director of the OPM, who makes all "basic policy, procedural, and eligibility decisions for the program." 5 C.F.R. § 950.201(a) (1983). Normally, there is bifurcated responsibility for the CFC drive in each participating locality. A designated private voluntary organization (the "Principle Combined Fund Organization" or "PCFO") "will raise money from Federal employees and administer the local campaign." *Id.* § 950.211(e). A

local Federal coordinating committee oversees the PCFO, and is authorized to make decisions regarding administration of the local campaign (subject to those constraints imposed by the Director). *Id.* §§ 950.211(a), 950.509. The PCFO is reimbursed for its administrative expenses from the funds raised for the participating charities. *Id.* § 950.509(e); appellant's brief, p. 13.

Each local campaign consists of a "single, annual drive," conducted in the fall. 5 C.F.R. § 950.103(b), (c) (1983). The Federal agencies involved conduct their "own solicitation among [their] employees, using campaign materials, supplies, and speakers furnished by or through" the PCFO. *Id.* § 950.103(d). Federal employees are encouraged to participate in this and other CFC responsibilities undertaken by the Federal Government "to the extent consistent with Federal agency policy and prudent use of official time. They are encouraged also to devote private time to such volunteer work." *Id.* § 950.105.

An information leaflet is distributed to each potential contributor. *Id.* § 950.521(c). This leaflet is printed and supplied by the PCFO, *id.* § 950.521(a), and is accompanied by a brochure listing each charity (or "voluntary agency") approved for participation in the campaign and providing "a brief statement of about 30 words on [each charity's] programs." *Id.* § 950.521(e)(2)(i). The content of this statement is provided by the participating charities and/or the PCFO, subject to approval of the local Federal coordinating committee.[2]

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[2] The appellant's brief indicates that PCFOs "prepare, print, and supply the contributor's leaflet." Appellant's brief, p. 12. It also acknowledges that participating charities will sometimes "provide a draft statement for inclusion in the leaflet," *id.* at 26, and indicates the appellant's "understanding that Federal officials managing local campaigns often approve the draft descriptive statements as they are submitted." *Id.* at 27 n.21. It does not challenge the appellees' contention that "it is the participating charities that in reality draft their descrip-

Federal employees who choose to contribute can either (1) designate specific participating charities for receipt of the contribution or (2) make undesignated contributions. Undesignated contributions are pooled and deemed designated to the local PCFO, *id.* § 950.513(a), which can then distribute the funds "to any participant in the local CFC." 47 Fed. Reg. 29,497 (1982).

B. *Exclusion of Legal Defense Funds From the CFC*

In 1980, the NAACP LDF and the Puerto Rican Legal Defense and Education Fund, Inc. ("PR LDF") applied to participate in the CFC, but the Government refused this request, arguing that these LDFs did not provide *direct services* to persons in the fields of health and welfare services. *See* Appellant's brief, p. 6.[3] This exclusion was challenged in *NAACP I*, where the District Court agreed with the plaintiffs that the "direct services" requirement did "not have the precision necessary to comport with [the First Amendment's] requirements." 504 F. Supp. at 1368. The court also challenged the suggestion that the plaintiffs did not provide direct services to the needy, pointing out that:

> The record is replete with the results of plaintiffs' work, indicating that law suits by plaintiffs have provided millions of dollars in back pay and benefits, and invaluable other "services" such as increased training opportunities, additional promotions, improved school programs, and better hospital facilities. Apart from their litigation activities, each plaintiff also provides "direct services" through scholarship programs and education efforts.

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tions for the fundraising brochure." Appellees' brief, p. 10 (footnote omitted).

[3] The "direct services" eligibility requirement was formalized in a Government manual which specified the procedures governing the CFC. Appellant's brief, p. 6.

Id.[4] The court enjoined the defendant from using the direct services requirement as a basis for rejecting pending or future applications from the plaintiffs, and encouraged the "government officials responsible for the program to re-examine the basic premises on which [the CFC] was established so that more acceptable standards [could] be developed." *Id.* at 1369.

In June 1981, the appellant circulated a memorandum discussing the *NAACP I* opinion and eligibility for the 1981 CFC. *See* Memorandum from Donald J. Devine to Department and Agency Fund-Raising Program Coordinators and Chairmen, Field Coordinating Groups (June 9, 1981) (hereinafter "Devine Memo I"), *reprinted in* I J.A. 52. In his review of so-called "borderline cases," Devine explained that while the imprecision of the "direct services" requirement had made it constitutionally infirm, he nevertheless found "some merit in the argument that these [legal defense funds do] not fall under Executive Order 10927." Despite the decision in *NAACP I*, Devine also persisted in contending that there is "logic to the direct vs. indirect services distinction." On this point, Devine argued that "[t]he difficulty is that the Manual does not define either of these criteria with the specificity required by the Court." *Id.* at 4, I J.A. 55.

Because more precise definitions had yet to be formulated, the memorandum concluded that the legal defense funds "must be allowed to participate in the present campaign," but added that this question was "among those that will be reviewed for the next campaign." *Id.* The memorandum also reported that "serious procedural questions have been raised regarding the eligibility" of the

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[4] The court independently held that the "direct services" requirement had substantially narrowed Executive Order 10,927 and, absent evidence that it was appropriate to exclude groups providing " 'indirect services' or [operating] along general class lines," imposition of such a limitation was arbitrary and capricious. 504 F. Supp. at 1368.

Planned Parenthood World-Population organization, but determined that "the facts presented are in doubt." *Id.* In discussing his decisions for the 1981 campaign, Devine offered that he had "come to the reluctant conclusion . . . [that] it is probably too late in the planning process to make the wholesale revisions which are necessary" to bring the regulations "more in accord with the precision required by the First Amendment." *Id.* at 3, I J.A. 54. Adequate standards would, he assured, be promulgated for the 1982 campaign. *Id.* at 5, I J.A. 56.

In October 1981, the appellant sent a memorandum to David Stockman, the Director of the Office of Management and Budget. Devine Memo II, *supra*, *reprinted in* I J.A. 70. The subject of this memorandum was a proposed new executive order which, among other things, provided that to be eligible for the CFC, an organization could "not seek to influence . . . the determination of public policy . . . by litigating public policy in any court on behalf of any person other than itself." *Id.* at 9, I J.A. 78. The appellant argued that unless this and other proposed eligibility restrictions were adopted:

> [T]he inevitable result will be mandatory admission to the Combined Federal Campaign of a multitude of organizations whose programs, whatever their benefit in other ways, are considered less critical to the national interest than those directed at common human needs in the areas of health and welfare. Furnishing Federal administrative effort and indirect support to obtain contributions for programs of lower priority would clearly conflict with the thrust of the President's budget decisions to accord priority of Federal support to vital health and welfare programs.

Id. at 3, I J.A. 72.

The proposed executive order was not adopted prior to the 1982 campaign. Instead, on March 23, 1982, Executive Order 12,353 was issued, revoking Executive Order 10,927, but retaining its general eligibility standard al-

lowing "appropriate" national voluntary agencies to participate in the CFC. Exec. Order No. 12,353, §§ 1, 9, 3 C.F.R. 139-40 (1982 Compilation). Pursuant to authority granted under the new executive order, the appellant promulgated comprehensive regulations to govern the 1982 campaign. These regulations defined "national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate" in language that clearly included LDFs.[5] 5 C.F.R. § 950.101 (a) (2), (3) (vii) (1983).[6]

Despite this official stance, there is no indication in the record that the appellant's opposition to LDF participa-

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[5] "National voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate" was defined to include national agencies that:

> (2) Are not "action" organizations within the meaning of 26 C.F.R. 1.501(c)(3)-1(c)(3) and are eligible to receive tax deductible contributions under 26 U.S.C. 170; and
>
> (3) Provide or substantially support one or more of the following services:
>
> . . . .
>
> (vii) Delivery of legal services to the poor and indigent, and defense of human and civil rights secured by law . . . .

5 C.F.R. § 950.101 (a) (2), (3) (vii) (1983).

[6] One of the major objections to the new regulations, when originally proposed in May 1982, *see* 47 Fed. Reg. 20,268 (1982) (to be codified at 5 C.F.R. § 950) (proposed May 11, 1982), had been that charitable organizations that serve women and minorities would be ineligible for the CFC because of criteria requiring that organizations "provide direct and substantial service throughout the country and in specific CFC locations." 47 Fed. Reg. 29,496 (1982). In the preamble to the final regulations the appellant indicated that objections regarding the eligibility of "legal defense, minority, and women's organizations" had persuaded OPM that some of its earlier criteria had been "overly restrictive," and consequently it had "modified both the general eligibility requirements and the direct and substantial presence criterion to meet most of the germane objections." *Id.* at 29,497.

tion in the CFC, as expressed in the June and October 1981 memoranda, ever waivered. Indeed, the appellant has contended that LDFs were admitted into the CFC in 1981 and 1982 "with the hope of reducing the potential for further litigation." Devine testimony, *supra*, at 32, *reprinted in* II J.A. 400. *See also* Devine Memo III, at 7, *reprinted in* I J.A. 112 (indicating that "litigation is highly likely" to result from executive order excluding LDFs). On February 2, 1983, a memorandum from the appellant to Craig Fuller, Assistant to the President for Cabinet Affairs, implied that inclusion of LDFs in the CFC had been viewed as an impermanent approach, *id.* at 3-4, I J.A. 108-09, and argued that exclusion of LDFs was "urgently required." *Id.* at 8, I J.A. 113. This memorandum included a draft executive order which incorporated almost verbatim the appellant's October 1981 proposal to exclude LDFs. *Id.* at 9, I J.A. 114.

The February 2, 1983 memorandum offered somewhat different justifications for the proposed exclusions than those that had been voiced previously. First, it was claimed that "[m]any employees objected" to inclusion of—in the appellant's words—"aggressive and controversial political and legal advocacy" groups. *Id.* at 4, 5, I J.A. 109, 110. He explained that "[s]everal unions organized boycotts of the CFC because of the participation of such groups as the Right to Work Legal Defense Fund." *Id.* at 4, I J.A. 109. The appellant argued that these protests jeopardized the CFC's fundraising objective, *id.*, and later warned that unless the campaign was reformed "devastating" employee boycotts "would bring the life of the Campaign to an end." Devine testimony, *supra*, at 6, *reprinted in* II J.A. 388. Second, the exclusion was justified by the impropriety of the Government's use of "taxpayer resources to raise funds for advocacy organizations and political education groups, however worthy or sympathetic may be their causes." *Id.* at 4-5, I J.A. 109-10. Finally, the appellant argued that because

it was "becoming increasingly difficult to draw any lines and keep participation to a manageable number of organizations" the President had directed that the CFC be limited to "traditional health and welfare agencies." *Id.* at 5, I J.A. 110.

One week later, Executive Order 12,404 was issued. It enumerated the objectives of the CFC[7] and established new eligibility criteria. The new criteria are both inclusionary and exclusionary. The inclusionary provision specifies that participation in the CFC is limited to organizations that are considered "voluntary, charitable, health and welfare agencies," and details at some length what this phrase encompasses.[8] The exclusionary provision

[7] The objectives of the Combined Federal Campaign are to lessen the burdens of government and of local communities in meeting needs of human health and welfare; to provide a convenient channel through which Federal public servants may contribute to these efforts; to minimize or eliminate disruption of the Federal workplace and costs to Federal taxpayers that such fund-raising may entail; and to avoid the reality and appearance of the use of Federal resources in aid of fund-raising for political activity or advocacy of public policy, lobbying, or philanthropy of any kind that does not directly serve needs of human health and welfare.

Exec. Order No. 12,404, § 1(b), 48 Fed. Reg. 6,685 (1983).

[8] To meet these objectives, elibility for participation in the Combined Federal Campaign shall be limited to voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families. Such direct health and welfare services must be available to Federal employees in the local campaign solicitation area, unless they are rendered to needy persons overseas. Such services must directly benefit human beings, whether children, youth, adults, the aged, the ill and infirm, or the mentally or physically handicapped. Such services must consist of care, research or education in the fields of human health or social adjustment and rehabilitation; relief of victims of natural disasters and other emergencies; or assistance to those who

stipulates that "[a]gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves shall not be deemed . . . eligible to participate" in the CFC. Exec. Order No. 12,404, § 1(b), 48 Fed. Reg. 6,685 (1983).

C. *The District Court Proceedings*

Shortly after issuance of Executive Order 12,404, the appellees brought suit arguing that the order unconstitutionally excludes them from the CFC. The appellees relied on the First Amendment, and their right to equal protection under the law, and requested that the appellant be enjoined from excluding the appellees from the campaign.

In analyzing the appellees' claims, the District Court carefully distinguished between the appellees' interests in designated and undesignated contributions. The court held that when soliciting *designated* contributions "an organization seeks to persuade an employee to make a donation to that organization," and Government restrictions on this solicitation are constrained by the First Amendment. *NAACP Legal Defense and Educational Fund, Inc. v. Devine*, 567 F. Supp. 401, 406 (D.D.C. 1983) (*"NAACP III"*). In contrast, control over the distribution of *undesignated* contributions is yielded to the CFC; such contributions are dedicated to the public good, and are not a response to the appeal of particular organizations. The lower court thus concluded that First Amendment rights are not implicated by restrictions on the distribution of undesignated contributions; such restrictions are "more properly the subject of an equal protection analysis." *Id.* Finding that the appellees' equal protection claim regarding undesignated contributions was not ripe, the lower

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are impoverished and therefore in need of food, shelter, clothing, education, and basic human welfare services.

Id.

court dismissed this portion of the appellees' suit. This dismissal is not appealed.[9]

However, the court held that excluding LDFs from the designated contribution portion of the CFC was unconstitutional. This decision was predicated on the court's finding that the CFC was a limited public forum. It reasoned that the CFC "permits numerous charitable organizations to present their messages to federal employees," *id.*, and " 'the government has, in effect, provided a billboard or channel of communication through which organizations can disseminate their appeals to federal workers.' " 567 F. Supp. at 407 (quoting *NAACP I*, 504 F. Supp. at 1367). Moreover, because "Executive Order 10927 made no differentiation among charitable organizations on the basis of how they accomplish their objectives," the court held that the appellees did "fall within the limits of that forum as it historically has existed." *Id.*

The court then considered, and agreed with, the appellees' claim that the exclusion of LDFs from the CFC was a content-based prohibition on speech, which would only be justified by a compelling state interest. It reasoned that as the protected expression "in an act of charitable solicitation is a request for contributions, the 'content' of that expression is the accompanying statement of how those contributions will be used. It is this 'content' that has, according to defendant, engendered such controversy among potential contributors as to warrant the exclusion based thereupon." *Id.* Finding that there was no compelling state interest to support the Government's position, the court enjoined the appellant from using Executive Order 12,404 to exclude legal defense funds from participating in CFCs. In particular, the court held that the Government's interest in excluding allegedly con-

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[9] In *NAACP II*, 560 F. Supp. 667 (D.D.C. 1983), the court held that denying two LDFs access to the undesignated funds raised in the CFC violated neither the First Amendment nor the Fifth Amendment.

troversial groups from the forum was "an *impermissible* basis for a restriction upon speech." 567 F. Supp. at 408.

II. Discussion

A. *First Amendment Restrictions on Government Regulation of Access to the CFC*

Charitable solicitation indisputably involves speech interests "that are within the protection of the First Amendment." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). *See also Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *National Black United Fund, Inc. v. Devine*, 667 F.2d 173, 178 (D.C. Cir. 1981). While conceding this general proposition, the appellant posits that the CFC does not involve solicitation by the participating charities, and is more accurately described as a "subsidy" by the Federal Government. The appellant then argues that the Government's decision to restrict this subsidy to certain charities does "not implicate the First Amendment." Appellant's brief, p. 25.

The appellant's description of the nature of the CFC flies in the face of uniform, and unequivocal, Government characterizations of the campaign over the past 20 years. In 1961, Executive Order 10,927 directed that arrangements be made for charitable organizations to "solicit funds" from Government employees, Exec. Order No. 10,927, § 2(a), 3 C.F.R. 454 (1959-1963 Compilation), and the two subsequent executive orders have contained similar mandates. *See* Exec. Order No. 12,404, § 1(a), 48 Fed. Reg. 6,685 (1983) (Director "shall make arrangements for voluntary health and welfare agencies to solicit contributions from Federal employees . . . at their places of employment or duty."); Exec. Order No. 12,353, § 1, 3 C.F.R. 139 (1982 Compilation) (same). The appellant has testified that President Kennedy's directive was "that worthy charities be permitted to solicit in the Federal workplace," Devine testimony, *supra*, at 3, *re-*

printed in II J.A. 385, and even in this litigation, he has acknowledged that the CFC "permits traditional health and welfare charities to make a strictly limited appeal in the federal workplace." Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment, p. 40, *NAACP III*, 567 F. Supp. 401 (D.D.C. 1983).

This uniform characterization of the CFC as permitting charities to solicit is entirely consistent with the long-standing practices followed under the program. The Government has understandably imposed time, place, and manner restrictions to prevent disruption of its facilities by solicitation through the CFC. These restrictions have never been viewed as depriving the permitted solicitation of *any* First Amendment protections, and they surely have not converted "solicitations" into "subsidies." The CFC remains a limited, but critical, opportunity for charitable organizations to prepare and—with the support of the Government—disseminate their message to Federal employees. *See National Black United Fund, Inc.*, 667 F.2d at 179 ("The CFC clearly provides *some* charities with a substantial opportunity to publicize their views . . . .") (footnote omitted). In reaching this conclusion, which is in accord with the position taken by the lower court and every other court that has considered the question, we are adhering to the view we expressed in *National Black United Fund, Inc.*[10]

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[10] "[T]he written message in the CFC pamphlets . . . advances protected speech and associational interests." 667 F.2d at 178. *See also NAACP I*, 504 F. Supp. at 1367 ("by providing organizations the opportunity to participate in the CFC, the government has, in effect, provided a billboard or channel of communication through which organizations can disseminate their appeals to federal workers. This process has proven extremely effective in raising charitable contributions. It is clear that the government must meet First Amendment strictures in its regulations concerning access to this channel of communication, which is, in fact, the only channel by which

Because this case involves restrictions on First Amendment activity, it presents an entirely different question than that decided in the case cited by the appellant, *Regan v. Taxation With Representation*, 103 S. Ct. 1997 (1983). In *Taxation With Representation*, the Court upheld a statute granting a tax exemption to certain nonprofit organizations that did not engage in substantial lobbying activities. In ruling that the First Amendment did not require Congress to extend this subsidy to the plaintiff's lobbying activities, the Court expressly pointed out that "[i]n this case . . . Congress has not infringed any First Amendment rights or regulated any First Amendment activity." 103 S. Ct. at 2001.

Although it is obvious that the CFC does involve a minor element of "subsidization," it is equally clear that the CFC also involves the regulation of important First Amendment activity. While we are in agreement with the District Court's finding that the Government has undertaken a role in the CFC so that it can most effectively regulate, rather than subsidize, charitable solicitation of Federal employees, *see NAACP III*, 567 F. Supp. at 408, we need not reexamine this determination here. For even if we accepted the appellant's contention that subsidization is one purpose of the CFC, it is clear that this would not insulate the campaign from the commands of the First Amendment. Permitting public speech on Government property, in Government facilities, or in a forum such as the CFC, will often involve some quantum of Government subsidization, and yet there has never been the faintest

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organizations can appeal to government employees at their workplace."); *National Black United Fund, Inc. v. Campbell*, 494 F. Supp. 748, 755 (D.D.C. 1980) ("Through the Combined Federal Campaign the government has afforded a forum and platform where national voluntary agencies may advance their causes before federal employees and solicit for financial contributions. . . . Viewed in light of recent rulings there can be little dispute that the Combined Campaign involves First Amendment activities . . . ."), *rev'd on other grounds*, 667 F.2d 173 (D.C. Cir. 1981).

suggestion in the case law that at some indeterminate level this causes the strictures of the First Amendment to dissipate. *See Perry Education Association v. Perry Local Educators' Association*, 103 S. Ct. 948 (1983) (use of intraschool mailing system); *Widmar v. Vincent*, 454 U.S. 263 (1981) (use of university facilities); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (use of public auditorium). While the costs incurred by the Government can certainly be relevant to the Government's interest in regulating access to public property for First Amendment activities, the Government's decision to incur such costs surely does not entirely remove such regulation from the purview of the First Amendment.

While we reject the appellant's claim that the First Amendment is not even implicated in this case, we also recognize that "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 129 (1981). As the Supreme Court has often indicated, "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *E.g., id.* In determining the degree of protection afforded by the First Amendment in this case, we are governed by the test articulated in *Perry Education Association*, 103 S. Ct. 948 (1983). *See generally* Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287 (1979); Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1; Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233; Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121 (1982).

In *Perry*, the Court considered a rival union's challenge to a collective bargaining provision between a school district and the teachers' exclusive bargaining representa-

tive. The provision stipulated that the bargaining representative, but no other union, would have access to the interschool mail system and teacher mailboxes in the district's schools. In evaluating the rival union's claim that this restriction violated its First Amendment rights, the Court distinguished three types of public property:

> (1) *Traditional Public Forums.* "At one end of the spectrum" is property such as streets and parks, which by tradition has " 'been held in trust for the use of the public, and, time out of mind, [has] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' " 103 S. Ct. at 954-55 (quoting *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939)). In these forums, communicative activity cannot be entirely prohibited, and content-based exclusions will be sustained only if the Government shows they are necessary to serve a compelling state interest and are narrowly drawn to achieve that end. *Id.* at 955. Content-neutral regulations of time, place, and manner of expression can also be enforced if they are narrowly tailored to serve a significant Government interest, and if ample alternative channels of communication are left open. *Id.*
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> (2) *Limited Public Forums.* Public property "which the state has opened for use by the public as a place for expressive activity," *id.*, may constitute a limited public forum. Although the state may not have been required to create this forum originally, and "is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum." *Id.*
>
> (3) *Public Property that is Neither a Traditional Nor a Limited Public Forum.* "Public property which is not by tradition or designation a forum for public communication is governed by different standards." *Id.* On this property, the Government may impose time, place, and manner regulations, and also "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

In applying this tripartite analysis to the facts in *Perry*, the Court held that the school mail facilities fell within the third (nonpublic forum) category. *Id.* The Court explained that there was no evidence indicating that permission had been granted "as a matter of course" to all who sought to distribute material; although selective access had been permitted to groups "such as the YMCA, Cub Scouts, and other civic and church organizations," this was not sufficient to "transform government property into a public forum." *Id.* at 956. Independently, the Court held that even assuming that this selective access had transformed the property into a limited public forum, the constitutional right of access would "extend only to other entities of similar character." As the purposes of the rival union's communications were entirely different than those of the civic organizations that had been permitted access, the rival union was not encompassed by the limited forum. *Id.*

In the instant case, the parties have debated at length the correctness of the lower court's holding that the CFC is a "limited public forum." In our view it is unnecessary to decide this question. Even in forums falling within the third (nonpublic forum) category identified in *Perry*, the First Amendment imposes constraints on the Government's right to allow access to some speakers while denying it to others. "The touchstone for evaluating" a differential access policy by the Government is whether the distinctions relied on by the Government "are reasonable in light of the purpose which the forum at issue serves." *Perry*, 103 S. Ct. at 957 (footnote omitted). Because our subsequent discussion reveals that the exclusion of LDFs does not satisfy this reasonableness standard, we do not

decide whether the test used in cases involving limited public forums is applicable.[11]

B. *Application of the Reasonableness Test to Differential Treatment of Like Speakers*

In *Perry*, the Supreme Court held that the school district's differential access policy satisfied the reasonableness standard applicable to public property falling within the third (nonpublic forum) category. In reaching this conclusion, the Court emphasized that the district's differential access policy was "based on the *status* of the respective unions rather than their views." 103 S. Ct. at 957. The Court explained that a bargaining representative "has official duties as representative [of the district's] teachers." Id. at 958 n.10. Use of the school mail facilities enabled the bargaining representative to perform these duties effectively. Id. at 958. In essence then, the district had simply restricted use of the mail system "to those who participate[d] in the forum's official business," *id.* at 959 (footnote omitted)—a restriction that was permissible "without further justification." *Id.* The Court also found that the exclusion of a rival union was

[11] There is some question about whether the forum in this case is the Federal workplace or the CFC itself. Although the appellant's argument that the workplace is the forum finds some support in *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983), the Supreme Court's analysis of school mail box facilities as a forum, *see Perry*, 103 S. Ct. at 955—as opposed to the school itself—suggests that the CFC is the relevant forum. Although we therefore will refer to the CFC as the forum at issue, this differentiation has little impact on our analysis because we assume, without deciding, that the forum is within *Perry*'s third category. In assessing the reasonableness of restrictions in such a forum, it is proper to consider Government interests in preventing disruption of the environment in which the forum is located—in this case, the Federal workplace. *See id.* at 959 (Government could restrict access to school mail facilities to "insur[e] labor-peace within the schools").

reasonable because of the need to insure "labor-peace within the schools," *id.* (footnote omitted), and because "substantial alternative channels [remained] open for union-teacher communication to take place." *Id.* Finally, the Court considered, but ultimately rejected, the rival union's suggestion that the district's policy was overinclusive and underinclusive. *Id.* at 959 n.13.

In this case, we also must evaluate a differential access policy adopted by the Government. While the Government was granted hundreds of charities access to the CFC, the Government has expressly denied access to the appellees and other LDFs. In one essential respect, however, this case is strikingly different than *Perry*: there is no discernible difference in the *status* of the appellees and that of the organizations which have been permitted access to the CFC.

In contrast to *Perry*, this is not a case in which access has been restricted to those engaged in the forum's official business—both the included charities and the appellees wish to engage in charitable solicitation through the CFC. Aside from this obvious equivalence, there are other manifest and substantial similarities between the included charities and the appellees. Like the included charities, the appellees are charitable organizations within the meaning of section 501(c)(3) of the tax code. 26 U.S.C. § 501(c)(3) (1976). It is also undisputed that the appellees are not engaged in political activities which are inconsistent with this charitable status. *See generally id.*; 26 C.F.R. § 1.501(c)(3)-1(c)(3) (1983). Equally clear is the fact that the appellees and the included charities share the traits that have traditionally been considered critical in determining eligibility for the CFC: all provide and support "direct health and welfare services."

In *NAACP I*, the court held that an attempt to exclude two of the appellees from the CFC on the ground that they did not provide "direct services" was constitutionally

infirm. By the same token, it cannot seriously be argued that the appellees do not "provide or support direct health and welfare services to individuals or their families" within the meaning of Executive Order 12,404. The appellees provide and support such services by furnishing legal assistance, by seeking judicial enforcement of the common law, statutory and constitutional rights of their clients, and by obtaining health and welfare benefits for the needy. Indeed, because the Government has included groups such as the National Parks and Conservation Association, the United States Olympic Committee, the Wilderness Society and the National Recreation and Park Association in the CFC, *see* Memorandum from Donald J. Devine to Chairmen and Chairwomen, Federal Coordinating Committees, National Voluntary Agencies, and Federated Groups 4 (Aug. 20, 1982), *reprinted in* II J.A. 551, a strong argument can be made that the appellees more closely comport with the standard established by the Government than do some of the included charities. In short, both in terms of their longstanding treatment under the tax code, and the parameters of the CFC as it has traditionally been understood, the status of the appellees and the included charities is virtually identical.

The Government's decision in 1983 to add an exclusionary clause to bar LDFs from the CFC obviously does not affect this conclusion. If the LDFs are generally of the type included in the campaign—and the preceding analysis indicates that they are—the Government cannot simply manufacture a difference in status by adding a specific exclusionary clause. Were this not the case, any charity could gain a "different" status from the others—regardless of their substantive similarities—for each is susceptible to categorization within a class of charities (*e.g.*, organizations providing food aid; organizations studying cancer) that could be targeted for exclusion by the Government.

The similarities between the appellees and the included charities make the Government's differential access policy

in this case far more troublesome than the policy considered in *Perry*. By permitting hundreds of charities to solicit through the CFC, the Government has plainly evidenced its view that such solicitation is not antagonistic to its interests nor inconsistent with the normal activities in the Federal workplace. On the contrary, it is clear that the Government views this charitable solicitation as highly worthwhile. Nevertheless, the Government has also chosen to forbid the same solicitations by similarly situated charities. Such differential treatment of like entities raises the serious possibility that a speaker, or class of speakers, has been excluded from a forum, not in furtherance of a legitimate interest of the Government, but instead simply because the speaker has been viewed disfavorably by the Government. *Cf.* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 36-41 (1975) (discussing "hidden" techniques for content discrimination in public forums).

The factual distinction between this case and *Perry* therefore makes it essential that we examine with some care the Government's claim that its differential access policy satisfies the requirement of reasonableness established by *Perry*.[12] In assessing the reasonableness of differential treatment of similarly situated speakers, we must consider whether the Government's discriminatory policy is related to, and in furtherance of, a legitimate Government interest, and whether the asserted interest adequately explains why some speakers have been permitted access, while others have been denied it. We must also be circumspect in evaluating conclusory statements by Government officials which do not comport with either the evidence in the record or common sense. In undertaking this review, we emphasize the narrow scope of our

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[12] Because we find that the Government's exclusion of LDFs is unreasonable, we need not address the appellees' argument that such exclusion is a viewpoint-based regulation.

holding: the inquiry that we have delineated is demanded by the similarities between the included and excluded charities in this case; we in no way suggest that this inquiry is appropriate in situations, such as that reviewed in *Perry*, which involve differential treatment of speakers who are not similarly situated.

C. *The Unreasonableness of Excluding LDFs From the CFC*

One point that is noteworthy about the Government's opposition to the inclusion of LDFs in the CFC is that the official explanations for this opposition have vacillated substantially over the past three years. Although this vacillation may be cause for suspicion, we nonetheless have accepted the various explanations at face value and have carefully considered each asserted justification for the Government's differential treatment of similarly situated charities in this case. Pursuant to this examination, we conclude that none of the Government's explanations satisfy the reasonableness test explicated in *Perry*.

1. *Assistance to the Needy*

The justification most consistently offered by the Government is its claim that exclusion of LDFs is a critical means of restricting participation in the CFC to "those charities which assist those who are most in need." Appellant's brief, p. 32. However, the appellant's suggestion that access to the CFC is somehow restricted to organizations whose programs "are aimed directly at the needs of the poor, the infirm, the hungry, and the truly needy," Office of Personnel Management News Release 1 (Feb. 10, 1983), *reprinted in* I J.A. 25, is patently ludicrous in view of the wide range of organizations included in the CFC. Although the programs of organizations like the United States Olympic Committee may be laudable, the Government certainly cannot explain the inclusion of such organizations and the exclusion of LDFs on this

ground. Indeed, in defending Executive Order 12,404, the appellant told a congressional committee that "sports associations" and "recreation societies" had never been considered appropriate for inclusion in the CFC because "they were not engaged in supplying health and welfare services directly to human beings who were ill, infirm, poor, or distressed." Devine testimony, *supra*, at 30-31, *reprinted in* II J.A. 398-99.

In contrast to the activities of some organizations that the appellant ultimately *did* include in the CFC, the undisputed evidence in the record reveals that as a result of the NAACP LDF's litigation efforts, primarily on behalf of low income blacks, "hundreds of thousands of persons have received direct benefits, such as income supplementation in the form of back pay and future earnings, better educations, improved health care, better housing and other living conditions, humane conditions of incarceration and, in the case of our capital punishment program, life itself." Affidavit of Jack Greenberg, Director-Counsel of the NAACP LDF 6 (Nov. 25, 1980), *reprinted in* I J.A. 130.[13]

2. *Political Advocacy*

The appellant has also argued that exclusion of LDFs from the CFC is necessary because they are political advocacy groups, and the Government has a legitimate interest in avoiding the appearance of Federal support for such groups. Appellant's brief, p. 36. While we agree that this is a legitimate interest, it is not advanced by excluding LDFs from the CFC. As we have indicated, LDFs are not considered political action groups under the

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[13] The affidavits in the record provided by representatives of the other appellees in this action are replete with descriptions and illustrations of their efforts to obtain judicial *enforcement of laws* designed to protect and aid the needy, as well as laws protecting the health of society by promoting a clean environment.

tax code. By providing tax exemptions to such organizations the Government has already resolved any questions concerning allegations of political advocacy by the LDFs. There is no indication that the Government ever saw a need to deviate from the tax code definition prior to the issuance of Executive Order 12,404—to the contrary, the regulations preceding Executive Order 12,404 expressly adopted the tax code's definition of a political action group. *See* 5 C.F.R. § 950.101(a)(2) (1983) (limiting eligible charities to those that "[a]re not 'action' organizations within the meaning of 26 C.F.R. § 1.501(c)(3)-1(c)(3) and are eligible to receive tax deductible contributions under 26 U.S.C. 170").

In fact, at no point in these proceedings, or in the documents included in the record, has the appellant provided a plausible explanation of why LDFs are properly characterized as political advocacy groups. The *only* distinction proffered by the Government between legal aid societies (which are included in the CFC) and LDFs is that the LDFs "are selective of clients on the basis of whether or not they have a cause, claim, or defense" that the LDF wishes to advance, Affidavit of Joseph A. Morris, General Counsel of the OPM 3 (Apr. 12, 1983), *reprinted in* II J.A. 433. But this surely cannot be the basis for considering LDFs political advocacy groups. While the participating charities—as well as the LDFs—share the common trait of providing health and welfare services, many of these organizations have chosen to focus on a particular facet of this extensive area. Whether this focus is on a particular group (*e.g.*, war veterans) or a particular need (*e.g.*, housing), this decision obviously does not turn a group into a political advocacy organization.

As the inclusion of legal aid societies in the CFC demonstrates, the fact that a group undertakes litigation seeking judicial enforcement of common law, statutory, and constitutional rights also does not make its activities

impermissibly political. We think it equally clear that an organization's view that it can aid the greatest number of individuals by pursuing relief for a class of individuals cannot be said to "politicize" its activities. *See generally* Affidavit of M.D. Taracido, President of PR LDF 2 (Nov. 25, 1980), *reprinted in* II J.A. 310 ("[I]t has been the judgment of PRLDEF that, with only six full time staff attorneys, its efforts would serve and benefit a far greater number of people through the vehicle of class action litigation than by litigation solely on behalf of individuals."). Moreover, because both legal aid societies and LDFs typically litigate individual actions and class actions, this consideration would not justify including the former in the CFC while excluding the latter.

Inevitably, many of the charities participating in the CFC will have identifiable philosophies. Nevertheless, as their treatment in the tax code demonstrates, this is neither inherently inconsistent with their charitable status nor does it invariably require that the Government deny them access to any Government facility. *Cf. Widmar v. Vincent*, 454 U.S. 263 (1981) (use of university facilities by student religious group); *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 771-72 (D.C. Cir. 1983) (political advertisements at public airport did not create appearance of Government support for, or endorsement of, the message advertised).

3. *The Claim That LDF Participation Would Be Controversial*

We next consider the appellant's claim that LDFs were excluded from the CFC because their participation was controversial. In his October 1981 memorandum, Dr. Devine revealed his staunch opposition to LDFs before there was any suggestion that their participation in the CFC might prove controversial. His more recent explanations for their exclusion have emphasized the need to minimize controversy. He argues that many employees

opposed their participation in the 1981 and 1982 campaigns, and that individuals and unions threatened to—and did in fact—boycott the CFC.[14]

The appellant's suggestion that LDFs were excluded from the CFC to pacify protesting employees is an extremely disturbing notion when considered in the light of First Amendment protections. The growth of our nation has not been accomplished by suppressing ideas or speakers that we find distasteful. *See Bridges v. Wixon*, 326 U.S. 135, 166 (1945) (Murphy, J., concurring).[15] To allow the intolerance (and threats) of a vocal minority (or even the majority) to determine who shall and shall not speak "would lead to standardization of ideas," *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), and would "fictionaliz[e] the *rationale* of the First Amendment." Note, *Constitutional Law—Free Speech and the Hostile Audience*, 26 N.Y.U. L. REV. 489, 491 (1951) (footnote

[14] The appellant has wisely chosen not to press the suggestion that exclusion of controversial groups is necessary to protect a captive audience. *See Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875, 2883 (1983) ("we have never held that the government itself can shut off the flow of mailings to protect those recipients who might potentially be offended. . . . Recipients of objectionable mailings . . . may 'effectively avoid further bombardment of their sensibilities simply by averting their eyes.' Consequently, the 'short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.' ") (citations omitted); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 542 (1980); *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 767 (D.C. Cir. 1983).

[15] For discussions of the First Amendment problems raised by the hostile audience, see H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 140-60 (1965); McGaffey, *The Heckler's Veto: A Reexamination*, 57 MARQ. L. REV. 39 (1973); Note, *Freedom of Speech and Assembly: The Problem of the Hostile Audience*, 49 COLUM. L. REV. 1118 (1949); Note, *Hostile-Audience Confrontations: Police Conduct and First Amendment Rights*, 75 MICH. L. REV. 180 (1976).

omitted). *See also West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."). This concern has long been reflected in our jurisprudence, and we have been loath to prohibit speech "merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969). Indeed, the Supreme Court has observed that "[t]he right to speak freely and to promote diversity of ideas *and programs* is . . . one of the chief distinctions that sets us apart from totalitarian regimes." *Terminiello*, 337 U.S. at 4 (emphasis added).

For the reasons we have already expounded, opposition to including LDFs in the CFC cannot be explained by relevant differences between LDFs and the charities included in the campaign. Nor has the opposition been aroused by the inflammatory nature of the LDFs' speech. Whittled to its core, the appellant's argument therefore is simply that when some ill-defined faction in an audience threatens to withhold charitable contributions *for any reason*, this threat of withholding is sufficient justification for suppression of speech. History unmistakably informs us that the principal victim of this type of censorship is the unpopular minority—be it religious, racial, political, or some other. *See* McGaffey, *The Heckler's Veto: A Reexamination*, 57 MARQ. L. REV. 39, 39 (1973).

Allowing such considerations to become the touchstone for regulating First Amendment speech leaves First Amendment liberties subject to the whim of the listener. It also provides Government officials hostile to the interests of a speaker a ready excuse for restricting these liberties. The Supreme Court has said in another context that "one man's vulgarity is another's lyric." *Cohen*

v. California, 403 U.S. 15, 25 (1971). Much the same can be said of attempts to identify the "controversial" speaker—what is controversial to some, may seem perfectly natural to others. Is the Government to determine which speakers are unacceptably controversial by counting letters of protestation, or should its unverified suspicion that a speaker will cause "ill feelings" between workers suffice? *See* appellant's brief, p. 36. Earlier litigation involving the CFC, in which Director Devine was ultimately required to include Planned Parenthood in the CFC, starkly illustrates the danger entailed by blithe acceptance of such Government determinations:

> Throughout the prolonged investigation of Planned Parenthood, defendant has stated no specific reason for the extra attention now focused on this agency, aside from the suggestions, without noted evidence supporting them, that financial problems exist and that this is a "controversial" agency. At the eligibility hearing on September 2 defendant stated his own views of Planned Parenthood as follows:
>
> > Everyone knows where I [Director Devine] stand in regard to the kind of practices that Planned Parenthood does. You promote abortions; I think that's detestible (sic). I think in a just world you'd have nothing to do with a charitable drive.
>
> Indeed, the controversial nature of this organization and the vocal opposition of pro-life groups appear to be either the primary factor delaying a decision, or a paramount consideration in that delayed decision.

Planned Parenthood Federation of America, Inc. v. Devine, No. 83-2118, order at 3-4 (D.D.C. Sept. 14, 1983) (order providing that if defendant failed to issue a decision with cogent reasons resolving application of plaintiff by 3:00 p.m. on September 14, plaintiff would automatically be approved for participation in the CFC).

These considerations compel us, at a minimum, to examine very carefully the appellant's suggestion that a

differential access policy for the CFC is justified by the Government's interest in excluding so-called controversial groups. Because this examination reveals the frailty of the appellant's claim on the facts of this case, we need not go as far as the lower court and decide whether the controversial nature of a speaker is in all cases an *impermissible* basis for restricting speech on public property.

In evaluating the appellant's claim, we again emphasize that this appeal involves only that portion of the CFC *in which employees choose* to designate their contributions to specific charities. The Government's role in the CFC facilitates a broad and informed choice by employees interested in making charitable contributions. As long as it is the employees that ultimately decide who they will support, the addition of brief statements by LDFs to a leaflet that already includes hundreds of statements should not engender significant protest.

It should also be understood that the access sought in this case is quite unlike that examined by the Supreme Court in *Greer v. Spock*, 424 U.S. 828 (1976). In *Greer*, the Court had to consider the lawfulness of a military authority's decision to prevent certain Presidential and Vice Presidential candidates from *making speeches*, and other plaintiffs from *distributing literature*, on a military reservation. In upholding the regulation on which the latter prohibition was based, the Court said that:

> [I]t is to be emphasized that [the regulation] does not authorize the Fort Dix authorities to prohibit the distribution of conventional political campaign literature. The only publications that a military commander may disapprove are those that he finds constitute "a clear danger to [military] loyalty, discipline, or morale," and he "may not prevent distribution of a publication simply because he does not like its contents," or because it "is critical—even unfairly critical—of government policies or officials . . . ."

Id. at 840 (footnote omitted). Justice Powell's concurrence further explained that "[a]lthough the recruits [on the reservation] may be exposed through the media and, perhaps, the mail to all views in civilian circulation, *face-to-face persuasion* by someone who urges, say, refusal to obey a superior officer's command, has an immediacy and impact not found in reading papers and watching television." *Id.* at 849 (Powell, J., concurring) (emphasis added).

In the instant case, there is no plausible reason to suspect that the limited and unobtrusive communications at issue will in any way interfere with the normal activities in the workplace. Workers frequently have some exposure to ideas that may prove controversial, but their normal reaction certainly is not to discontinue the work they are being paid to perform. Should they do so, they can be reprimanded or otherwise disciplined. Absent any tangible evidence in the record suggesting that some real and serious disruptions of the workplace will likely occur, we are unwilling to defer to the fanciful—and somewhat specious—speculations offered by the appellant.[16]

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[16] In *Perry*, the Supreme Court recognized that disruption of the workplace would be highly likely if an employer was required to allow a *rival* union access to the school mail system so that it could challenge a lawfully certified union. Not only would the *rival* status of the unions create serious problems, but the continuing presence in the workplace of an *unrecognized* union would be wholly at odds with the system of "exclusive representation" that is uniformly recognized in collective bargaining in this country.

There are no such plausible assertions that may be advanced in the instant case. Not only does the record fail to support the suggestion that work was disrupted when LDFs participated in the CFC in 1981 and 1982, the fear of such disruption is completely counterintuitive. Assertions of workplace disruption resulting from First Amendment activities can often be made, and almost inevitably will be made when speech critical of the Government is involved. Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1334 (1979). Unquestioning acceptance of such arguments would turn "workplace disruption" into "a shibboleth, the mere recitation of which dictates constitutionality." *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (discussing assertions of "administrative inconvenience").

Nor are we persuaded by the appellant's suggestion that inclusion of LDFs imperils the fund-raising purposes of the CFC. Although some unions protested the inclusion of one particular LDF in the campaign, the record indicates that these unions encouraged members either to simply *designate* the charities they wished to support, *see* Statement of AFL-CIO Executive Council 2 (Aug. 4, 1982), *reprinted in* I J.A. 97, or to "give *directly* to causes that we have traditionally supported and that have supported us." Letter from International Association of Machinists and Aerospace Workers to Grand Lodge Representatives, *et al.* (Aug. 18, 1982), *reprinted in* I J.A. 93 (emphasis added). Moreover, as long as all employees are permitted to *choose* which groups they will contribute to, providing employees a broad range of groups to choose among may encourage, rather than discourage, employee contributions. The undisputed evidence in the record reveals that substantial numbers of employees chose to contribute to LDFs, *see, e.g.*, Affidavit of Emanuel Owens, Coordinator of NAACP LDF's Combined Federal Campaign 8-9 (Mar. 1983), *reprinted in* II J.A. 302-03 (indicating that NAACP LDF received at least $170,000 through CFC in 1981-82); Report of Capital Area CFC (Mar. 2, 1983), *reprinted in* I J.A. 105 (indicating that among the 41 national service agencies listed, the Sierra Club LDF received the fourth highest percentage of designated contributions, and the NAACP LDF received the seventh highest), and that there was a 3.8% *increase* in funds raised by the 1982 CFC, Affidavit of P. Kent Bailey, Program Analyst, OPM 2 (June 30, 1983), *reprinted in* II J.A. 553, in spite of the "declining [size

of the] federal work force." Letter from Jack Greenberg to President Reagan 1 (Jan. 11, 1983), *reprinted in* I J.A. 101.[17]

Hence, the record does not support the appellant's claim that the Government acted reasonably in excluding LDFs from the campaign to appease employees opposed to their inclusion. It should also be noted that the appellant's protestations of concern about controversial eligibility decisions is tellingly rebutted by his treatment of charities providing family planning services. As we have indicated, the appellant resisted inclusion of

[17] The appellant's suggestion that the inclusion of controversial groups necessitated "extraordinary exertions" by Federal officials conducting the CFC, is wholly unpersuasive as a justification for excluding LDFs. Generally, Federal employees are only encouraged to participate actively in the work of voluntary agencies in the CFC "to the extent consistent with Federal agency policy and prudent use of official time," 5 C.F.R. § 950.105 (1983), although one or more Federal executives may be "loaned" to work on a local CFC. *Id.* § 950.509(k). The appellant has not claimed that the controversial nature of the CFC required additional personnel to be assigned to its management, nor has he made any attempt to provide even the roughest approximation of the extra efforts which allegedly were required.

In fact, the record indisputably indicates that the concern raised by the appellant is merely a post hoc rationalization for the exclusion of LDFs. Although in the proceedings below the appellant's briefings made some vague references to "workplace disruption," it was never suggested that the efforts required of Federal personnel justified exclusion of LDFs, or that they played any part in the Government's decision to exclude LDFs. Similarly, neither the appellant's February 1983 memorandum, nor his subsequent testimony, even argue that the alleged extra efforts required by the inclusion of LDFs were so substantial that they justified exclusion of LDFs. The only evidence cited in the appellant's argument on this point on appeal, is a statement in the preamble to new regulations proposed in June 1983, *see* 48 Fed. Reg. 29,458 (1983)—a statement made by OPM well after this litigation had been commenced.

Planned Parenthood in the campaign, ostensibly on the ground that its participation was controversial. However, participation by the Moral Majority Foundation, Inc., was allowed even though its activities include providing educational services with respect to abortion counseling.[18] One can hardly envision decisions more likely to lead to outcries of "politicization" and demands for boycotts of the campaign. The Government cannot simply "pick and choose" its controversies as a means to restrict speech by those it views disfavorably. On the facts of this case, the appellant's claim—that the alleged controversial nature of LDFs justifies denying them the same opportunity to communicate permitted similarly situated charities—must be rejected as wholly unreasonable.

4. *Restricted Access to Avoid Undue Burdens on the CFC*

The final rationale asserted by the appellant is the need to avoid innundation of the CFC. Absent some reasonable *distinction* between LDFs and the included charities, however, this consideration cannot possibly justify the Government's differential access policy. If the Government is required to limit the access of charities that it cannot meaningfully distinguish, it must allocate spots in the CFC between these charities in some even-handed manner, *see, e.g., Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981) ("first-come, first-served system"), rather than arbitrarily identifying LDFs for exclusion. Additionally, the appellant has recently acknowledged that this Government interest is not furthered in any noticeable way by exclusion of LDFs:

[18] The appellees' brief indicates that the Moral Majority Foundation was included in the 1983 campaign, appellees' brief, p. 40 n.72; *see also* 1984 COMBINED FEDERAL CAMPAIGN OF THE NATIONAL CAPITAL AREA, 1984 COMBINED FEDERAL CAMPAIGN AGENCY LISTING 2 (1983), and this point has never been challenged by the appellant. It was raised at oral argument and again was not disputed.

> I do not suspect that many groups that are presently eligible for the campaign would not be eligible under our proposal. . . . [T]here will be very little impact in terms of numbers on those eligible. . . . It is going to have an impact [on the number of charities], but in terms, let's say, of 500 in the Washington, D.C. area, we may be talking about ten or something like that, and in terms of percentage in it would be very small.

Devine testimony, *supra*, at 44-45, *reprinted in* II J.A. 412-13.

5. *Alternative Forums*

Finally, we need not consider at great length any claims made regarding the alleged availability of alternative forums to the appellees. In a society that cherishes freedom to speak, deprivation of a particular forum typically will not leave the speaker without *any* opportunity to communicate. It is therefore not surprising that the availability of alternative forums has never been considered to justify Government attempts to "pick and choose" among preferred speakers. To allow such a justification would be to nullify important rights of free speech.

The LDFs have every right to seek access to the CFC once the Government makes the forum available to other like charities and offers no reasonable explanation for the exclusion of LDFs. It is hardly surprising that the LDFs have challenged their exclusion from the CFC. Effective charitable solicitation depends on economical and efficient means to communicate one's message to mass audiences. The CFC is the *exclusive* forum for charitable solicitation in the Federal workplace, and the undisputed evidence in the record indicates that it is a critical medium for making charitable appeals to Federal employees.[19]

[19] *See, e.g.*, Affidavit of Jonathan Lash, Staff Attorney for the Natural Resources Defense Council 4 (Mar. 29, 1983), *reprinted in* II J.A. 336 ("If NRDC was excluded from future Combined Federal Campaigns, it will be extremely difficult for us to reach the federal employee audience, and because of the costs of direct mail, a much greater proportion of revenue will have to go to fund raising activities, with the result that a smaller proportion of the organization's resources will be used for its program.").

The principal point here, however, is not that the CFC is an effective forum for solicitation; the same result that we reach today would hold even if it could be shown that the CFC produced relatively little by way of contributions for LDFs. The principal point in this case is that, in the absence of any reasonable ground for making the CFC forum available to charities like LDFs but not to LDFs, the restriction challenged by the appellees violates the First Amendment.

A Postscript in Response to the Dissent

In affirming the District Court's opinion, we have been guided by a fundamental, yet hardly earthshaking, proposition: the First Amendment does not permit the Government to differentiate between similarly situated speakers in regulating speech on public property, unless there is some reasonable basis for this differentiation. This limitation on the Government's right to discriminate *unjustifiably* between like speakers, in no way imperils the Government's power to insist reasonably on order within its facilities. It is simply a recognition that a free society neither requires, nor countenances, the creation of vast enclaves in which one is permitted to speak only at the fancy of the Government.

The dissent obviously takes a very different view of the First Amendment. It proclaims that the Amendment is the "basic bulwark of our liberty," but proceeds to make a mockery of this declaration by advocating a "test" which arbitrarily and unreasonably removes the workplaces of millions of Americans from the Amendment's protection. We need not respond at length to the views

expressed in this dissent. For the most part, it is sufficient for us simply to note that the test it advocates completely disregards any value of the First Amendment, and the "facts" it analyzes are totally removed from those actually before us.

The dissent begins—as it must—by acknowledging that *Perry* requires that distinctions between speakers in "nonpublic forums" be *reasonable*. *See Perry Education Association v. Perry Local Educators' Association*, 103 S. Ct. 948, 957 (1983). *See also United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 131 n.7 (1981). It then inexplicably ignores its own words by applying a *rational basis* test. Although the dissent does not deem it necessary to explain what this *does* require the Government to establish, it is quite emphatic in its enumeration of what is *not* required of the Government:

> (1) the Government's distinction need not further a significant Government interest (Dissenting Opinion at 14);
>
> (2) the Government need not produce any evidence that the asserted interest will be advanced (Dissenting Opinion at 16);
>
> (3) a Government prohibition of otherwise protected speech is justified when it is in response to the protestations of potential listeners (Dissenting Opinion at 20-26);
>
> (4) the existence of less restrictive means to advance the Government's interest is irrelevant (Dissenting Opinion at 15); and
>
> (5) the fact that the Government is motivated by a desire to suppress a speaker, or even a speaker's view, is irrelevant if the Government can point to some rational basis for its treatment of the speaker (Dissenting Opinion at 28 n.48).

This is an extraordinary view of the protection afforded by the "basic bulwark of our liberty." The word "reasonable," as used by the Supreme Court in *Perry*, has been rendered meaningless by the dissent. We do not have the slightest doubt that *any* Government restriction on speech would survive scrutiny under the so-called deferential test enunciated by the dissent. Indeed, the dissent seems to embrace a notion that any Government prohibition of First Amendment activity is by definition rational because it is an act of the Government. In advocating such an approach, the dissent has simply chosen to ignore the clear teachings of *Perry*.

The dissent's defense of the Government's differential access policy is predicated on its unquestioning acceptance of the Government's characterization of this policy. The dissent repeatedly labels the charities included in the CFC as noncontroversial, "traditional charities," while labeling the excluded LDFs as "political advocacy groups"; it therefore has little trouble finding a rational basis for the Government's policy. This is a gross oversimplification of the policy that is really at issue in this case, and disregards the undisputed facts about the organizations that *actually participate* in the campaign.

By acquiescing in the Government's abstractions, the dissent offers no explanations for the real distinctions that are being made by the Government. The dissent does not tell us why LDFs can reasonably be considered "advocacy" groups, while legal aid societies are not. It does not tell us why affording employees an opportunity to contribute to LDFs is unacceptably controversial, while differential treatment of groups providing abortion counseling is not. Nor does it explain how the sports and recreation societies—which Dr. Devine said have no place in a charity drive—better provide for the essential needs of the hungry, sick and ignorant, than organizations dedicated to the protection of basic legal rights.

Content to rely on Dr. Devine's self-serving and inaccurate characterizations of the CFC, the dissent proceeds to consider whether a justification can be found

for treating "traditional charities" differently than "advocacy groups." Given the tenuity of the test it employs, one should not be surprised to find the dissent persuaded by *every* justification raised by the Government during its three year effort to exorcise LDFs from the CFC. Even more revealing is the dissent's unqualified acceptance of justifications that either *were not even mentioned* by the Government until this litigation was commenced or were *expressly repudiated* by the Government.

We have already elucidated the obvious shortcomings in these justifications; some final observations are now in order. First, the dissent's consistent references to LDFs as "political advocacy groups" implies a difference between the activities of LDFs and other charities that simply ignores reality. *See* Devine testimony, *supra*, at 52, 53, *reprinted in* II J.A. 420, 421 (arguing that it is "perfectly appropriate" for charities to "lobby or otherwise present their views on issues that relate to their interests"). Even the dissent appears uncomfortable with the implication that "real" charities transcend advocacy, since it makes no serious attempt to argue that "political advocacy" is even a rational basis for distinguishing LDFs from the charities included in the CFC. Instead, the dissent unconvincingly attempts to salvage its position by asserting that the Government will appear less political if LDFs are excluded. The Supreme Court's "nonpublic forum" cases have never suggested that restrictions on *nonpolitical* speech can be justified by the baseless complaints of some listeners that the Government is being political. We can only express our amazement at the dissent's claim that unreasonable distinctions between speakers—*imposed simply to appease protesting listeners*—will somehow make the Government seem *less* political.

The dissent's discussion of the "controversial nature" of LDFs is equally disturbing. The dissent conveniently ignores the fact that only *designated* contributions are

at issue in this case. It does not explain why affording employees the *opportunity* to contribute to LDFs will prove as "controversial" as the possibility that employees might *unwittingly* support them through undesignated contributions. Even more fundamentally, the dissent's discussion reveals its willingness to allow the reaction of an audience—*no matter how unworthy its basis*—to define the scope of First Amendment activity. Whether the cause of this reaction be racial hatred, religious bigotry, or otherwise, in the dissent's view the Government acts wisely when it responds by silencing the speaker.[20]

Nothing more need be said of this dissenting opinion. The dissent has simply attempted—by advocating an astonishingly narrow construction of the First Amendment and by refusing even to question the Government's assertions of interest in this case—to make the First Amendment a nullity in that part of the public domain that it considers the "nonpublic forum." The Constitution does not envision such pockets of tyranny, and we unqualifiedly repudiate the dissent's attempt to create them.

CONCLUSION

Although the Government has substantial latitude in regarding speech or property falling within the third category delineated in *Perry*, this regulation cannot discriminate between speakers absent some reasonable justification for doing so. In this case, the Government has permitted hundreds of charities to make unobtrusive appeals to Federal employees through the CFC, and has thereby facilitated its employees' awareness of a broad

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[20] This is tellingly evidenced by the dissent's characterization of a letter which warns of "groups that stir up negative feelings because of religious . . . affiliation," as "contain[ing] much wisdom." Dissenting Opinion at 24 n.35. *See* Letter from Sidney M. Ford to Donald Devine (Jan. 12, 1983), II J.A. 487, *reprinted in* Dissenting Opinion at Addendum B.

range of options for their charitable support. Our review of the multifarious and shifting explanations advanced by the appellant reveals no reasonable basis for denying the appellees the same opportunity. Instead, it most strikingly reveals the appellant's steadfast desire to find some way to exclude LDFs, while including charities that he viewed more favorably. The First Amendment does not tolerate discrimination of this sort by the Government.

Judge Wright is in complete agreement with this opinion, but would reach the issue that we find unnecessary to decide: whether the CFC constitutes a limited public forum. He would hold that it does, and would affirm the District Court's decision because the applicable First Amendment requirements have not been satisfied.

The District Court's decision is affirmed. As ordered by the District Court, the appellant, his agents and subordinates, are permanently enjoined from excluding the appellees from participation in the Combined Federal Campaign with respect to the solicitation of designated contributions on the basis of the provisions of section 2(b) (1 through 3) of Executive Order 12,353, as amended by section 1(b) of Executive Order 12,404.[21]

So ordered.

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[21] The appellant's objections to the District Court's order are frivolous and merit only a brief response. As the Government has chosen to impose time, place, and manner requirements dictating that charitable solicitation in Federal facilities be conducted through the CFC, and it is only the unreasonable exclusion from the CFC pursuant to Executive Order 12,404 that is at issue in this appeal, it was completely appropriate for the District Court to enjoin exclusion from the CFC on the basis of the executive order as a remedy. The appellant's suggestion that the appellees should instead be permitted to make direct, personal appeals in the workplace, not only goes beyond what is at issue in this case, but is hopelessly inconsistent with the appellant's professed concerns about disruption and controversy in the workplace.

STARR, *Circuit Judge*, dissenting: Western philosophers, theologians, and statesmen of widely varying viewpoints have affirmed for over two thousand years that charity—the feeding of the hungry, the healing of the sick, and the educating of the ignorant—has a claim on the human conscience that transcends political differences. In response to this ancient claim, the federal government conducts an annual charitable drive among federal employees known as the Combined Federal Campaign. Like those private employers which conduct similar drives, the federal government has a legitimate inteerst both in minimizing the time devoted by its employees to the charitable campaign and in preventing the campaign from disrupting the workplace. As a provider or financier of welfare and health benefits, the government, unlike private employers, has a profound and direct interest in the success of this charitable drive, for what the needy receive from charity they will not require from government.

The majority's decision today to mandate the federal charitable campaign's inclusion of advocacy groups—non-profit, tax-exempt organizations engaged in the pursuit of policy goals through litigation—distorts the nature of charity. The results of this exercise of judicial power not only threaten the success of the federal charitable drive, but impose as well unnecessary burdens on the federal resources required to conduct it. If the law required this unhappy result, I would suppress my own misgivings about the wisdom of the decision and stoutheartedly join the majority. But today's decision is compelled neither by the Constitution nor by relevant decisions of the Supreme Court. In fact, as I will seek to demonstrate, the majority's decision is at war with the law of the First Amendment.

To foreshadow the discussion to come, the bedrock distinction between a "public forum" and "nonpublic forum" in First Amendment law—a pivotal distinction avoided

by the majority's analytical legerdemain—is designed to prevent that basic bulwark of our liberty from irrationally transforming the nature of a facility which is devoted to purposes *other* than public discourse and debate. We are dealing here not with a street or park or other gathering place for exchange in the marketplace of ideas. This is the federal workplace. And while the majority's approach does not directly challenge the proposition that a federal charitable campaign conducted in the federal workplace constitutes a "nonpublic forum" under applicable First Amendment analysis, the majority, in striking down the limitations at issue here, employs a stringent standard of review under the guise of a "reasonableness test" that comports not at all with the deferential standard demanded by Supreme Court precedent. In a word, much of the majority's analysis is inapplicable to the case at hand.

Furthermore, the majority seems to overlook the fact that this case comes before us on the advocacy groups' motion for summary judgment. Far from reading the evidence in the light most favorable to the government, the majority in fact blinks at substantial evidence in this record that would support the restrictions at issue here even in the face of more searching judicial scrutiny than governing case law warrants. Inasmuch as the government has presented ample evidence in support of the challenged restrictions to survive a summary judgment motion testing their reasonableness, I respectfully dissent.

I.

A.

The standards for measuring government-imposed limitations upon First Amendment access to public property differ depending upon the nature or character of

the property at issue.[1] *Perry Education Association v. Perry Local Educators Association*, —— U.S. ——, 103 S. Ct. 948 (1983). Judicial review is most exacting when the place to which access is sought is categorized as a "public forum." Governmental restrictions on access to a public forum will be upheld only if the limitations are "necessary to serve a compelling state interest and . . . [are] narrowly drawn to achieve that end." *Id.* The standard of review is also stringent when a "limited public forum" is at issue; however, such a forum may legitimately be limited to the use of groups or the discussion of subjects for which the forum was created in the first instance. *Perry*, 103 S. Ct. at 955 n.7. In contrast, the standard of judicial review for limitations on access to a "nonpublic forum"[2] is considerably more deferential. Such restrictions will be upheld so long as they are "reasonable" and are "viewpoint neutral," which is to say that the restrictions are "not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 103 S. Ct. at 955.

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[1] The government also argues that because the CFC represents a government subsidy to charity, the exclusion of certain organizations from the enjoyment of the fruits of the CFC is to be tested under the equal protection clause rather than the First Amendment and is permissible under the analysis of a recent Supreme Court decision, *Regan v. Taxation with Representation*, —— U.S. ——, 103 S. Ct. 1997 (1983). In view of my conclusion that the CFC is a nonpublic forum and that the restrictions meet the "reasonableness" test for public forums under the First Amendment, I do not reach the government's argument under *Regan*.

[2] *Perry* is the first Supreme Court case to use the term "nonpublic forum." 103 S. Ct. at 957. *See also* note 3, *infra*, as to "limited public forums." Previous cases simply stated that a particular place was not a public forum. *See, e.g., United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 128 (1981).

The paradigm instances of a public forum are streets and parks—traditional places for public assembly and expression. *See United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981) (citing, *e.g.*, *Hague v. CIO*, 307 U.S. 496 (1939)). Other forums deemed "public" for First Amendment purposes are university meeting facilities, *see Widmar v. Vincent*, 454 U.S. 263 (1981) and municipal theaters, *see Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 846 (1975).[3] On the other hand, the Court has held that a school's internal mail system, *see Perry*, *supra*; postal mailboxes, *see Greenburgh*, *supra*; military bases, *see Greer v. Spock*, 424 U.S. 828 (1978); and advertising panels in rapid transit vehicles, *see Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion), are not public forums.

These cases clearly indicate that no bright-line test exists to distinguish between public and nonpublic forums. Instead, the Supreme Court cases analyze the nature of the particular facility in question and determine whether the forum is "public" or "nonpublic" in light of three factors. *First*, the Court analyzes the history of the facility to determine whether the public has traditionally used the place as a forum for expression of views. *See Greer v. Spock*, *supra*, 424 U.S. at 838 ("The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free pub-

[3] *Perry* characterizes *Widmar* and *Conrad* as "limited public" forums although those cases themselves characterized the forum under review simply as "public." Indeed, *Perry* is the first Supreme Court decision to introduce and discuss the concept of a "limited public forum," although in one prior case a forum was simultaneously characterized as a "public forum" and a "limited public forum." *See Heffron v. International Body for Krishna Consciousness*, 452 U.S. 640, 655 & n.16 (1981).

lic assembly and communications of thoughts by private citizens is thus historically and constitutionally false").[4] *Second*, the Court has looked to the capacity in which the government is operating the forum. The Court is less likely to determine that a public forum exists when the government is operating the facility or installation in the role of employer; *see Greer v. Spock*, *supra*, 424 U.S. at 830, 838 (emphasizing that military bases are used for the training of personnel); or a commercial venturer, *see Lehman*, *supra*, 418 U.S. at 303 (emphasizing that in running a rapid transit service the municipality was operating as a commercial venturer);

[4] *See also Greenburgh*, 453 U.S. at 120 (quoting Justice Holmes' aphorism that "a page of history is worth a volume of logic") (citation omitted); *Lehman*, 418 U.S. at 302 (quoting Lord Dunedin's statement that "the truth is that open spaces and public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place you would have to know the history of the particular place").

Determining whether the forum has been used for public discourse helps the court in several ways in deciding whether strict scrutiny of restrictions on access to the forum is appropriate. First, if the forum is one in which speech has traditionally flourished, there is little danger that stringent judicial review resulting in greater "speech" of some kind will alter the nature of the forum. However, the relative absence of public discourse in a forum suggests that it has a *bona fide* purpose other than communication. Second, restrictions on traditional forums may cut off crucial public debate, because such restrictions prevent people from expressing themselves in places upon which they have reasonably come to rely for public expression. If, however, the forum is not traditionally given over to public discourse, the restrictions will cause no displacement of speech, and the existence of traditional forums will provide the public with obvious alternative venues. Finally, the judiciary has great experience in dealing with traditional forums like parks and streets. However, it may be thought to possess less expertise concerning the nature of nonpublic forums. Therefore, a standard of review which gives more deference to the other branches of government that operate such forums would seem entirely appropriate.

Greenburgh, *supra*, 453 U.S. at 127 (emphasizing the commercial nature of the postal service).[5] *Third*, and finally, the Court inquires into whether the government permits the forum to be used "indiscriminately" by the public. *See Perry*, 103 S. Ct. at 956.[6]

B.

The threshold question in this case, which the majority chooses not to address, is how to characterize the forum at issue here in accordance with the Supreme Court's teaching, as set out above. The government argues that the forum at issue is the federal workplace in which the campaign takes place. The advocacy groups argue, in contrast, that the forum should be viewed as the Combined Federal Campaign, as embodied in the standardized pamphlet listing charitable organizations which is circulated to employees throughout the federal workplace. While the Supreme Court has never squarely addressed a similar problem, this court recently resolved a similar issue in *United States-South West Africa/ Namibia Trade & Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983) [hereinafter cited as *Namibia*]. In that case, the district court in its public forum analysis had focused solely upon the advertising display cases at National Airport, disembodied from the airport

[5] Considering the capacity in which the government is operating the forum is also useful in determining the level of First Amendment scrutiny. If the government is operating the forum for the use of the public, strict scrutiny is, under binding precedent, reasonably required to ensure that the public in fact has access to the facility. However, when the government is operating a facility as a commercial venturer or employer, it is performing functions to which the public in general has no expectation of access.

[6] If the forum is in fact being used indiscriminately by the public, there seems no reason to suspect that the introduction of more speakers will change the nature of the forum. *See also* note 4 *supra*.

terminals in which the displays were situated. In reversing the district court, this court stated that the analytical focus upon the display cases alone was unduly "narrow." To "appraise accurately" whether the forum is public or nonpublic, the court concluded that it had to evaluate the advertising panels in the context of the airport of which they were a part. *Namibia*, 708 F.2d at 784.

In my view, this approach—analyzing the communicative medium in the larger context of the place in which the facility exists—is supported both by Supreme Court precedent and the rationale of the public forum doctrine. As the *Namibia* court itself noted, focusing on the larger context "parallels the Supreme Court's consideration of the functions and physical limitations of the buses at issue in *Lehman*." *Namibia*, 708 F.2d at 764 (citation omitted). Furthermore, in deciding that political speakers had no right of access to a *public area* on a military base, the Supreme Court analyzed that area in the context of the history and traditions of the military base as a whole. *See Greer v. Spock*, *supra*. Both in *Lehman* and *Greer*, therefore, the Court eschewed an artificial, piecemeal analysis in determining precisely the metes and bounds of the forum in question.

Namibia is entirely consistent with this common-sense approach. Moreover, because the public forum doctrine involves an analysis of property and facilities in order to determine the appropriate level of scrutiny for restrictions on access, it would be anomalous to analyze the communicative medium—such as an advertising display panel in an airport terminal or on a bus—without reference to the place in which it exists. The fact that an advertising display panel is situated on a bus rather than in a park or publicly owned property abutting a street is highly relevant to an evaluation of government-imposed restrictions on access to the advertising panel.

The anomaly of ignoring the larger place within which the medium for communication is situated would be particularly glaring in cases where, as here, the communicative medium is inseparable from the place in which it is situated. The CFC pamphlets are circulated only within the federal workplace. So too the solicitations by federal workers on behalf of the CFC occur only within the federal workplace. It is therefore to the federal workplace to which we must initially look to decide whether a public or nonpublic forum analysis is appropriate.

The federal workplace in which the CFC takes place, both military and civilian, bears little resemblance to a public street or park, places that the Supreme Court has found to be paradigms of the public forum. Indeed, as we have already observed the Supreme Court in *Greer v. Spock* specifically held that the federal military workplace—the military base—is a nonpublic forum. The Court reasoned that there is no history or tradition of public expression at a military base. It stated that "it is . . . the business of a military installation like Fort Dix to train soldiers, not to provide a public forum." *Greer v. Spock*, 434 U.S. at 838.

This reasoning, in my view, applies just as readily in the setting of the civilian workplace. It is the business of the federal civilian workplace to attend to the myriad interests and duties of government, not to provide a public forum for First Amendment communication. Not surprisingly, therefore, the federal workplace has not traditionally served as a place for public assembly or communication of ideas among private citizens. Public debate and discussion of United States foreign policy, for example, are at the core of First Amendment concerns, but that debate and discussion between private citizens need not be permitted in State Department offices at Foggy Bottom.

The Supreme Court has suggested repeatedly in *dicta* that public institutions such as the federal workplace, whose primary mission lies other than in serving as

forums for communication, are simply not public forums. "Were we to hold to the contrary [*i.e.*, that the forum at issue was public], display cases in public hospitals, libraries, *office buildings*, military compounds, and other public facilities would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." *Lehman, supra*, 418 U.S. at 304 (plurality opinion of Blackmun, J.) (emphasis added).[7] The presence of security personnel and sign-in sheets throughout the federal workplace powerfully attest to the undisputed fact that, in a word, the offices of the Department of State or the Department of Defense are not public parks surrounded by walls and ceilings. They are places to which the general public, even for First Amendment purposes, is not automatically permitted to enter simply to exercise constitutional rights.

C.

The advocacy groups contend, however, that the federal government's introduction of a charitable drive in the federal workplace creates a public forum, albeit of a limited nature.[8] There is absolutely no evidence in this record, however, suggesting any tradition that a charitable drive conducted in an employer's workplace is open to the public. Nor is any evidence of such a tradition likely to exist. To the contrary, a letter from the chairman of the Board of Governors of the United Way of

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[7] This *dicta* is reaffirmed in *Perry, supra*, 103 S. Ct. at 957-58 n.9 and *Greenburgh, supra*, 453 U.S. at 130 n.6. Indeed, even where the government facility in question is an office whose purpose is to disseminate information, such as an Office of Public Affairs, it has never been the law that free, unimpeded access must be permitted to such offices on the part of the general public, or that only carefully crafted and narrow time, place or manner restrictions on access would be constitutionally permissible.

[8] The advocacy groups claim that they should be able to participate in the CFC on the same terms as any other group.

America, a charity invariably included in both public and private employer charitable drives, makes it crystal clear that charitable endeavors in the workplace have depended upon the agreement of government, industry, and labor to put aside political differences; as the letter aptly states, the inclusion of groups engaged in pursuing political or policy goals endangers that long-standing "social compact." [9] From the evidence in this record, in short, it seems abundantly clear that employers have traditionally not opened their charitable drives to any public group that wishes to participate.[10]

Moreover, the government, as represented by six different Administrations, has never voluntarily included advocacy groups in the federal campaign, let alone every group that wishes to appeal to federal workers for funds. President Kennedy's 1961 Executive Order initiating the Federal Charitable Campaign limited participation in the campaign to "national voluntary health and welfare agencies and such other[s] . . . as may be appropriate." Exec. Order No. 10,927, § 2(a), 3 C.F.R. 454 (1959-1963 compilation). There is *undisputed* evidence in the record that

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[9] *See* Letter from Donald V. Seibert, Chairman, Board of Governors, United Way of America to the President of the United States (Sept. 15, 1982) ("The implications of these actions by organized labor [in threatening a boycott of the campaign] can and do extend beyond the Combined Federal Campaign. Until now, in the case of charity, leaders of government, industry, and labor have been able to put aside differences between them on other matters. They have come together at the workplace in a social compact to assist the less fortunate in our society through support of charitable endeavors such as the Combined Federal Campaign as well as the annual nationwide United Way Campaign. To jeopardize that compact appears clearly to run contrary to the national interest and the goals of your administration."). I J.A. 99. A copy of this letter is attached to this opinion as Addendum A.

[10] In part II.A. below, I will discuss the relevance of the *status* of advocacy groups as tax-exempt charitable organizations.

this language was understood to limit participation in the campaign to charities that provided traditional health and welfare services to the needy, not organizations devoted to legal advocacy in pursuit of various notions of public policy.[11] This understanding was codified in a government manual governing the conduct of the campaign: it limited participation to organizations "providing direct services to persons in the fields of health and welfare services." [12] Only after the federal district court for this District in *NAACP Legal Defense and Educational Fund, Inc. v. Campbell*, 504 F. Supp. 1365 (D.D.C. 1981), invalidated this provision as unacceptably vague under the First Amendment did the government allow advocacy groups to participate.[13] The advocacy groups thus entered

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[11] *See* Testimony of Donald Devine, Director of OPM, before the Subcommittee on Manpower and Housing of the Committee on Governmental Operations of the U.S. House of Representatives (Mar. 24, 1983) ("Everyone seemed to understand that the Combined Federal Campaign was intended to support the traditional kinds of charities that undertake research into the causes and cures of dread diseases or that render health and welfare services directly to needy people. The world of not-for-profit organizations had always included many other kinds of groups and institutions, of course, ranging from private schools and universities to opera guilds, sports associations, recreation societies, and many more, including the newer "advocacy groups" such as legal defense funds and public policy research organizations, all of which number today in the many tens of thousands. But it had never been thought appropriate —and certainly not practical—for these kinds of institutions to participate in the Combined Federal Campaign, especially since they were not engaged in supplying health and welfare services directly to human beings who were ill, infirm, poor, or distressed, thereby lessening the burdens of government in meeting such needs."). II J.A. 385-86.

[12] *Manual on Fund-Raising Within the Federal Service* § 5.21 (1977) (U.S. Government Printing Office No. 006-000-01024-5).

[13] In *Campbell*, the district court impliedly premised its strict First Amendment scrutiny on the proposition that CFC was a

the CFC only as a direct consequence of a lawsuit contested by the government. On this record, it it clear beyond doubt from the two-decade history of the campaign that the government is seeking to return the CFC to the traditional contours within which it has always operated. This, then, is not a case of the government's trying to close the barn door after voluntarily allowing the horse to gallop away.

Moreover, *Perry* plainly means that a traditionally nonpublic forum is not transformed into a public forum, limited or otherwise, by the government's conferring selective access to the facility on the part of certain groups. The Court in *Perry* specifically rejected the contention that use of the internal school mail system by the Cub Scouts and similar groups turned the mail system into a public forum or limited public forum, since such selective access did not amount to "indiscriminate use" by the general public. 103 S. Ct. at 955-956.[14] Certainly the Com-

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public forum. 504 F. Supp. at 1367. I respectfully disagree with the learned district judge's conclusion in this respect. But in any event, it is clear that the government's alteration of the contours of the campaign in response to a decision declaring the campaign to be a public forum should not be taken into account in deciding whether the campaign is a public or nonpublic forum.

Lest there be any misapprehension as to the significance of the fact that no appeal was maintained in *Campbell*, the Supreme Court has recently reminded us, in a unanimous opinion, that decisions by the Solicitor General to appeal or not to appeal are governed by a variety of factors which would not necessarily obtain as to a private litigant. *United States v. Mendoza*, —— U.S. ——, 52 U.S.L.W. 4019, 4021 (U.S. Jan. 10, 1984).

[14] *See also Greer v. Spock, supra*, 424 U.S. at 838 n.10 (1976) ("The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix . . . surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever.").

bined Federal Campaign is not and never has been used indiscriminately by the public, nor is the public allowed indiscriminate access to the federal workplace.

As indicated above, the government does not circulate all appeals from the public in the CFC but only those from certain traditional health and welfare organizations generally included in an employer's charitable drive. Furthermore, the "speech" permitted to the charitable groups is strictly limited in ways that clearly prevent any possible claim of indiscriminate access. First, the CFC allows the pamphlets to be circulated once a year for six weeks. 5 C.F.R. § 950.103 (1983). Second, the statements are limited to thirty-word descriptions of the nature of the program. 5 C.F.R. § 950.521. These materials must not contain "distractions that compete for the contributors' attention," 5 C.F.R. § 950.521(d) and "must have the approval of the local Federal Coordinating Committee."[15] 5 C.F.R. § 950.521(a). The charitable group is not permitted to make any spontaneous or personal appeal of its own; to the contrary, federal workers circulate the pamphlets and make any follow-up solicitations. These strict limitations on speech conclusively establish that the CFC, as conducted and regulated in the federal workplace, resembles not at all the public forums that "have been

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[15] Such restrictions on expression are difficult to characterize as time, manner and place regulations but would normally be classified as prior restraints under traditional First Amendment analysis. If the CFC is categorized as a limited public forum with the stringent First Amendment scrutiny which that categorization implies, such regulations would likely not survive. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971) (discussing the heavy presumption against prior restraints). Thus, categorization of the CFC as a public forum may endanger other regulations of the campaign, thereby radically altering its nature. Perhaps the majority's silence on the precise nature of the CFC in the federal workplace is the better part of valor in light of the havoc which would inevitably be wrought by applying a limited public forum analysis.

used for the purpose of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, *supra*, 307 U.S. at 515.

II.

A.

Once the forum is categorized as nonpublic, the restrictions on access must be upheld if they are both reasonable and neutral as to the viewpoint espoused by the "speaker." *Perry*, 103 S. Ct. at 955. The Supreme Court's decisions make it abundantly clear that the standard of "reasonableness" is deferential, giving substantial weight to judgments of those familiar with the nature of the forum—an approach far removed from that employed by the majority.[16] In none of these cases was the government required to produce a "compelling" or "significant" governmental interest[17] to justify the restrictions. To the contrary, the government must simply provide a "rational basis" for its exclusion of certain organizations from the nonpublic forum.[18] Nor has the Court engaged in the

[16] Commentators have noted the deferential standard applied to nonpublic forums. *See, e.g., Note, A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 Stan. L. Rev. 121, 127 (1982) (characterizing "scrutiny" of nonpublic forums as "weak"); Cass, *First Amendment Access to Government Facilities*, 65 Va. L. Rev. 1287, 1303 (1979) (noting that the Supreme Court grants little protection to speech when the place has been characterized as a nonpublic forum). Indeed, it would seem pointless to go to the trouble of distinguishing between public and nonpublic forums only to employ a stringent scrutiny analysis to restrictions of access to both types of facilities.

[17] *See Greenburgh, supra*, 453 U.S. at 131 n.7 (rejecting the "significant governmental interest" test advanced by Justice Marshall in dissent).

[18] *See Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 134 (1977).

"least restrictive alternative analysis" to strike down restrictions in a nonpublic forum.[19] Indeed, in *Greenburgh*, *supra*, 453 U.S. at 132, the Court refused to be drawn into balancing the interests of the civic association in using the mailboxes at issue there as against the interests of the government in restricting mailbox access—a task

[19] Indeed, in some nonpublic forum cases less restrictive alternatives have been suggested only to be ignored by the Court. *See, e.g., Lehman, supra*, 418 at 321 (suggesting that the "impression of city endorsement can be dispelled by requiring disclaimers to appear prominently on the face of every advertisement").

In this regard, the majority's postscript advances the view that under this analysis, "*any* Government restriction on speech would survive scrutiny under the so-called deferential test enunciated by the dissent." Majority Op. at 37 (emphasis in original). In rather heated terms, the majority takes umbrage with what is, in fact, a straight-forward analysis of governing precedent. After all, *Jones* flatly holds that the burden on the government in nonpublic forum cases is "only [to] demonstrate a *rational basis* for their distinctions between organizational groups." 433 U.S. at 134 (emphasis added).

The majority's *sturm und drang* approach is misplaced. While judges should refrain from rendering advisory opinions, I have no difficulty at all in suggesting that, for example, the government's elimination from the CFC of only those charitable groups that assist members of discrete and insular minority groups would plainly run afoul of *Perry*'s analysis. So would any exclusion based upon disagreement with the views or positions of the particular charitable organization, under the viewpoint-neutrality analysis set forth below. The majority therefore need not lose any sleep over concern that *Perry* ushers in an era of utterly unbridled discretion on the part of government officials. Neither *Perry* nor anything in this opinion, dispassionately read, suggests anything of the sort.

in which the lower court had engaged at length. The Court made it clear that the standard of review applicable to content-neutral time, place and manner regulations did *not* have to be met in the case of restrictions on access to a nonpublic forum.

Moreover, in several cases the Court has not required the government to produce evidence of dangers against which the government-imposed restrictions on access are to be aimed. The judicial deference evidenced in those cases is particularly noteworthy in divining the appropriate standard of review in the instant case, because the dangers against which the restrictions upon CFC participation are aimed are strikingly similar. For instance, when in *Perry* the school system alleged that allowing a union which was a rival to the incumbent bargaining agent to use the school's internal mail system would disrupt the school, the Court specifically stated that it would require no proof of the possibility of disruption. *Perry*, 103 S. Ct. at 959 n.12.[20] Similarly in *Lehman*, the worthies of Shaker Heights produced no evidence whatever, nor were they required to, to justify the contentions that allowing paid political advertisements would endanger long term transit revenues and that such advertisements would create "lurking doubts about favoritism" on the part of city authorities. 418 U.S. at 304.

In particular, the majority dramatically departs from this body of prior case law when it in effect steps up the

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[20] The Court's refusal to require evidence of disruption cannot be explained away as an instance of its extraordinary deference to the national interest in labor stability. To justify its refusal to require such evidence, the Court cited another nonpublic forum case, *Greer v. Spock*, *supra*, which did not require the production of evidence to prove that political speech would disrupt the military workplace. It will not do to tuck *Perry* away in a pigeonhole marked "Labor Relations," and thus drain it of all efficacy outside the employment setting. *Perry*'s locks are not so Samson-like to be so easily lopped off.

standard of judicial review by virtue of the fact that advocacy groups have the same *status* under the Internal Revenue Code as traditional health and welfare organizations. The tax laws were not drafted with the conduct of charitable campaigns in the federal workplace in mind. With due respect both to the majority and to the tax laws, the Internal Revenue Code may well be of abiding relevance and interest to taxpayers, but it is breathtakingly irrelevant to whether the government's restrictions on CFC participation are reasonable. It is certainly true that *Perry* emphasized the respective statuses of the union that, as the elected bargaining agent, was allowed to use the internal mailbox, and of the union that, as a mere rival with no collective bargaining responsibilities, was excluded from mailbox access. *But, critically, the Supreme Court has not heightened judicial review in nonpublic forum cases when there happens to be no difference in legal status between the admitted and the excluded.* In *Greenburgh, North Carolina Prisoners' Union, Greer*, and *Lehman, supra*, the Court did not demand that the groups or individuals treated unfavorably have different statuses as codified in some law like the tax code; rather, the Court merely inquired into whether the government had a rational basis for distinguishing between the groups in the context of the forum.

Indeed, *Perry*, insofar as it speaks to the reasonableness of restrictions in a very different kind of nonpublic forum, supports the government's position here. In *Perry*, the Supreme Court emphasized the relevance of private industry practice in evaluating whether there was a rational basis for the differential access given to different groups. 103 S. Ct. at 958 n.11. The evidence in this record, indicating that private industry admits traditional health and welfare groups but not advocacy groups like appellees into its charitable drives,[21] suggests that the government's distinction is not capricious.

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[21] For a discussion of this evidence, see part I.C., *supra*.

As a practical matter, the majority's invocation of the various organizations' legal status as the linchpin of its constitutional analysis would potentially transform the federal charitable drive into a Babel of competing organizations, once the news goes forth that tax-exempt status, without more, entitles an organization to participate in the CFC. By using tax-exempt status *vel non* as the touchstone for access to government property, the majority seemingly opens wide the door to organizations that have not heretofore participated in the CFC. From religious organizations to public policy thinktanks, from museums to universities, the range of tax-exempt organizations is wide and diverse. And it is not at all clear how, under the majority's analysis of reasonableness, principled limitations to exclude any tax-exempt organization can be fashioned. By the judiciary's imaginative use of the First Amendment, the entrance to the federal workplace charitable drive has thus been thrown wide open to any organization that can display evidence of having passed into the safe harbor of section 501(c)(3). Perhaps there is no longer a need for churches to depend exclusively upon giving on Sunday; coupling the majority's analysis with the Supreme Court's holding in *Widmar v. Vincent*, *supra*, 454 U.S. 263, suggests an attractive new vehicle for the effectuation of ecclesiastical stewardship drives.

B.

In contrast to the majority's conclusion, the government's showing in this case easily meets the deferential standard enunciated by the Supreme Court for restrictions on access to nonpublic forums. The government identifies three legitimate interests served by limiting access to the CFC so as to exclude advocacy groups. Importantly, the government has adduced substantial and at times overwhelming evidence that those interests will be impaired unless such groups are excluded from the campaign. *First*, the exclusion of legal advocacy groups promotes both the government's general interest in the present and future success of the charitable campaign and the government's specific interest in seeing that a maximum amount of charitable aid goes to the needy. *Second*, the exclusion promotes both the government's interest in minimizing the time the campaign draws away from federal workers' performance of their primary duties and the governmental interest in preventing disruption in the workplace. *Third*, the exclusion aids the federal government in avoiding the appearance of political favoritism.

The government's position on this appeal is, moreover, greatly strengthened by the procedural posture in which this case comes before us. The district court granted summary judgment in favor of the advocacy groups' position that their exclusion from the campaign was an unconstitutional abridgement of First Amendment rights. It is well settled that "the party who defended against the motion for summary judgment [in the trial court] will have the advantage of the [appellate] court's reading the record in the light most favorable to him, will have his allegations taken as true, and will receive the benefit of the doubt when his assertions conflict with those of the movant." *See* 10A C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2761 (1983). The grant of summary judgment is to be upheld only if the record, when reviewed in this light, show "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Because the government has presented abundant evidence on whether the inclusion of advocacy groups (1) threatens the viability of the campaign, (2) distracts federal employees from their primary duties, and (3) creates the appearance of political favoritism, this court can affirm the grant of summary judgment only by concluding that these three evils are legally

irrelevant to the reasonableness of the government's determination to exclude advocacy groups.[22]

It is self-evident that the government has an interest in the success of the CFC.[23] From the evidence in this record,

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[22] As shown in part II. A., *supra*, the Supreme Court has viewed such considerations as quite relevant to whether a restriction on access to a nonpublic forum is permissible.

With respect to the summary judgment issue, the approach in this case stands in marked contrast to a very recent decision of this court overruling the district court's grant of summary judgment. *See Family Division Trial Lawyers of the Superior Court—D.C., Inc. v. Moultrie*, No. 83-1016 (D.C. Cir. Jan. 6, 1984). In that case, over my dissent, which was grounded on the conclusion that no evidence could sustain a constitutional attack on a voluntary court assignment system, this court showed great solicitousness for permitting a case to be made out by the attorneys-plaintiffs in the face of a motion for summary judgment by District of Columbia officials.

[23] The majority seems to doubt that the government can promote the charitable campaign by excluding a class of organizations that pursue controversial and often mutually antagonistic policies. It cites many First Amendment cases which declare that the right to speak cannot be impaired because of the controversial nature of what the speaker has to say. *None of these cases, however, concern what is at issue here—restrictions on access to nonpublic forums.* A nonpublic forum is not designed to promote or even sustain controversial discourse but has other objectives. In this case, the objective is raising money for charity, and the government can legitimately pursue that objective at the expense of diversity of speech. In *Lehman*, 418 U.S. at 304, the Court allowed a municipally-owned bus company to refuse political advertisements in favor of "less controversial" advertisements which would not endanger long term revenues, which was the objective of that nonpublic forum.

Moreover, the majority blinks at reality in claiming that the controversial nature of the participation of advocacy groups does not stem from the nature of the groups themselves. *Groups that are promoting or opposing policies like affirmative action or the closed shop are controversial, for*

it is manifestly clear that inclusion of the advocacy groups caused both specific losses in the 1983 campaign[24] and threatened the success of the charitable campaign in the years to come. While the amount of contributions measured in constant dollars was unchanged from the previous year,[25] boycotts in several localities caused sharp contribution declines in those areas, thus indicating that inclusion of advocacy groups did in fact cost the campaign money. For example, in Bremerton, Washington a union boycott caused contributions to drop by over twelve percent.[26] Contributions in Dade County, Florida also

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the plain reason that the arguments for and against such policies are controvertible in a way that arguments in favor of a policy of seeking a cure for cancer are not.

[24] In the CFC, federal employees are solicited in the late fall of the year for a pledge of contributions that will then be deducted from the employee's paycheck in the following year. Thus, solicitations for the 1983 campaign took place in the fall of 1982. Because all active work on behalf of the 1983 campaign took place in 1982, people writing to the government about the campaign often refer to it as the "1982 campaign." From the dates of their letters, it is clear that they are referring to the 1983 campaign. In quoting their comments, we will not bother to correct their error of appellation.

[25] In nominal terms, contributions rose 3.8% over the previous year. *See* Affidavit of P. Kent Bailey (June 30, 1983). II J.A. 553. However, since inflation as represented by the consumer price index was 3.9% in 1982, the real increase was nil.

[26] *See* Testimony of Donald Devine, Director of OPM, before the Subcommittee on Manpower and Housing of the Committee on Governmental Operations of the U.S. House of Representatives, March 24, 1983, *supra* note 11. II J.A. 401. *See also* Telegram of W.K. Holt to Donald P. Devine (Jan. 11, 1983). II J.A. 482. Mr. Devine also testified that contributions in Cleveland and Colorado Springs fell by over 10 percent and that in Boise, Idaho the drop was nearly 20 percent. Because all inferences must be drawn in the defendant's favor on this summary judgment motion, it should be inferred that these otherwise unexplained drops were caused by the inclusion of advocacy groups.

slipped considerably by virtue of the inclusion of controversial advocacy groups.[27] The Denver campaign reported that contributions from postal workers were down because of a boycott by a craft union.[28] The International Association of Machinists and Aerospace Workers boycotted the campaign nationwide with consequences that defy calculation.[29]

The record, moreover, strongly suggests that without the exclusion of advocacy groups the disruption of the campaign will deepen in the future. These are not cassandrian fears. Uncontradicted evidence indicates that in many localities and agencies the 1983 campaign achieved success only because federal workers involved in the CFC, from local campaign heads to campaign workers, devoted extraordinary time and effort to enlisting and cajoling their colleagues to contribute to the CFC despite the inclusion of advocacy groups.[30] There was evidence that this level of support could not be sustained in the future.[31]

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[27] *See* Telegram from E.T. Stephenson to Donald Devine (Jun. 18, 1983). II J.A. 469.

[28] *See* Letter from Gary L. Packer, MSC Manager/Postmaster to Donald Devine (Feb. 11, 1983). II J.A. 361.

[29] *See* Letter from William Winpisinger, President of International Association of Machinists and Aerospace Workers to IAM members (August 11, 1982). I J.A. 92.

[30] *See* Affidavit of P. Kent Bailey (May 18, 1983). II J.A. 466. Moreover, Members of Congress were drawn into the disputes and proved instrumental in preventing statewide boycotts of the CFC by writing to unions and promising to study possible rule revisions which would exclude groups who have "no place in a broad-based charitable appeal like the Combined Federal Campaign." *See* Letter of Daniel Inouye, U.S. Senator, et. al. to Benjamin Toyama, President of Hawaii Federal Employees Metal Trades Counsel (May 30, 1983). I J.A. 29.

[31] *See* Letter from C. Wayne Hawkins, Chairman of the Dallas-Fort Worth Federal Executive Board to Donald Devine (Jan. 17, 1983). I J.A. 37.

The decline in the number of contributors to the campaign was viewed as a distressing signal of possible troubles ahead, representing an erosion of the base on which future campaigns depend.[32] Indeed, in thirteen of the twenty-one largest local CFC's on which information was available, the number of contributors declined.[33] The record further indicates that at least in some localities one important union, the American Federation of Government Employees, was persuaded to stay in the 1983 campaign but promised to boycott future campaigns if advocacy groups were not excluded.[34]

Thus, the government had received a substantial body of information which taken collectively suggested that the CFC faced difficulties in the future. The government should not be held powerless to forestall the serious erosion of future campaigns simply because the campaign did not immediately collapse under the weight of advocacy groups. In Justice Jackson's memorable phrase, the Bill of Rights is not a suicide pact, but neither should it be turned into an instrument for forced self-immolation at more deliberate speed.

These concerns over the campaign's future were widely shared; contrary to the majority's implication, the concerns were in no way limited to the Administration in Washington. Local CFC administrators stated that the inclusion of advocacy groups placed a "stumbling block" in the "path of potential givers" which would give them

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[32] The rate of participation in the campaign decreased by approximately 1.1%. *See* Affidavit of P. Kent Bailey (May 18, 1983). II J.A. 466.

[33] *See* Affidavit of P. Kent Bailey, *supra* note 32.

[34] *See* Letter from C. Wayne Hawkins, *supra* note 31; Letter from Theodore D. Wood, Chairman, 1984 Denver Metropolitan Area Combined Federal Campaign, to Donald Devine (Jan. 14, 1983). I J.A. 38.

an excuse not to contribute.[35] The AFL-CIO, while not boycotting the campaign, stated that inclusion of advocacy groups "cannot help but impair the enthusiasm with which trade union members respond to CFC solicitations."[36] The United Way, a seasoned veteran in the ways and means of charitable fundraising, indicated through its national chairman that the inclusion of advocacy groups threatened the "social compact" between government, industry, and labor which has sustained charitable enterprises across the Nation.[37] Members of Congress expressed concern.[38]

In the face of these uniform and uncontradicted misgivings about the CFC's future, it is wholly unwarranted for the judiciary—the arm of the government intended by the Framers to be the least dangerous branch—to dismiss as unreasonable the remedial actions taken to pro-

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[35] *See, e.g.*, Letter from Sidney M. Ford, Chairman of the Executive Board of Greater St. Louis Missouri to Donald Devine (Jan. 12, 1983). II J.A. 487. This letter contains much wisdom concerning the atmosphere necessary for a successful charitable drive. "When advocacy groups or groups that stir up negative feelings because of religious or union affiliation are present [in a general fund drive], we place an undue stumbling block in the path of many potential givers. There is a growing concern on the part of Federal officials that if the CFC does not remove many of the controversial organizations, dire results will occur. Many people are looking for a chink in the CFC armor, and it happens that by including advocacy groups we play into their hands; and we provide the 'I'll give at home' individual excuse for not participating." This letter is attached to this opinion as Addendum B.

[36] *See* Statement by the AFL-CIO Executive Council on the Combined Federal Campaign (Aug. 4, 1982). I J.A. 96.

[37] *See* Letter from Donald V. Seibert, *supra* note 9, and Addendum A.

[38] *See, e.g.*, Letter from Hon. Claudine Schneider to Donald Devine (Sept. 13, 1982). II J.A. 362.

tect the campaign from the wounds inflicted by an earlier district court decision that was not reviewed on appeal.[39]

The government likewise has an interest in minimizing the amount of time federal employees spend in soliciting their colleagues, for such solicitations are conducted "during duty hours." 5 C.F.R. § 950.103(e). An extra hour spent on fundraising for the CFC is presumably an hour not spent on other government business. The record is replete with evidence that the inclusion of advocacy groups required federal workers to spend time persuading unions not to boycott the campaign, explaining to skeptical workers how they could designate funds to avoid giving money to advocacy groups, and trying to help people surmount the pyschological and emotional barriers which the inclusion of litigation advocacy groups firmly

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[39] As to the significance of the government's not appealing that decision, see note 13 *supra*.

Besides its interest in maximizing revenues for the campaign in general, the government has a specific interest in directing the revenues to the poor and needy, because as the provider of last resort the government is ultimately responsible for the needy. The government has a rational basis for concluding that in general a dollar given to a traditional health and welfare charity will more certainly aid the needy than a dollar given to an advocacy group. The connection between the activities in which advocacy groups engage and aid for the needy is speculative for two reasons. First, the methods by which advocacy groups advance their policies are risky. In the course of litigation, lobbying, or influencing elections an advocacy group may spend a huge sum of money only to lose. Second, the policies such groups advance are often controversial in the sense that opinion is still divided over whether they aid the needy or not. Indeed, since many of these groups have antagonistic aims, it is simply not possible that all their policies are bringing net benefit to the needy. In view of the uncertainty over the effect of advocacy groups' policies on the plight of the needy, the government can rationally choose to exclude them from the CFC.

implanted in the way of charitable giving.[40] In the Portland, Oregon, area alone approximately 2,500 more hours were devoted by Federal employees to soliciting and managing the Portland area CFC.[41] Such an increase in federal employee time spent on the campaign would obviously represent on a national scale a very real and substantial additional burden on federal resources.

While the record does not indicate that any specific contretemps occurred in the workplace because of the advent of advocacy groups into the CFC, facts exist which would, it seems to me, warrant the government's reasonably inferring the possibility of such occurrences. Union leaders denounced the inclusion of advocacy groups in terms reflecting neither detachment nor polite disinterestedness.[42] In at least one locality, pressure groups appeared outside the federal workplace, handing out pamphlets and pressing workers not to give to the CFC.[43]

Finally, the record suggests that the appearance of governmental favoritism toward advocacy groups is a genuine and deep concern. The AFL-CIO, the country's largest labor organization, opened a news release on the 1983 CFC with the following *pronunciamento*: "The

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[40] *See, e.g.*, Letter of Wayne Hawkins, *supra* note 31; Letter from San Juan Romero, Chairman of the Greater Cincinnati Federal Executive Board to Donald Devine (Jan. 12, 1983) ("Making goal [sic], however, was due primarily to the inordinate amount of official time and effort put into the campaign by everyone concerned. The Federal Government can no longer afford to do this!"). II J.A. 473.

[41] *See* Letter from M. Eldon Green, Chairman of the Combined Federal Campaign—Portland, Oregon, to Donald Devine (Jan. 18, 1983). II J.A. 486.

[42] *See* Letter from William Winpisinger, *supra* note 29 and discussion in text *infra* at note 45.

[43] *See* Letter from Colonel J. W. Small, Director of Defense Mapping Agency (Jan. 19, 1983). II J.A. 471; Letter of Sidney M. Ford, *supra* note 35.

Reagan Administration has granted yet another opportunity to the far right wing to enrich itself, this time at the expense of federal and postal employees and the needy." [44] Others were even less complimentary about the presumed motives inspiring the introduction of advocacy groups into the CFC. One union leader colorfully described the CFC's inclusion of the National Right to Work Foundation as equivalent to inviting Jack the Ripper to an "afternoon tea party for maiden ladies." [45] In contrast to *Lehman* where the Court found that the mere *possibility* of "lurking doubts" of political favoritism was a reason for excluding political advertisements from rapid transit advertising panels, here the record contains the acrid comments of national union leaders who in plain English expressly charged the Administration with politically inspired favoritism.

Of course, just as there is no suggestion in *Lehman* that Shaker Heights was actually parceling out advertising space on the basis of political beliefs, the record indicates that the CFC included in 1983 all advocacy groups that wanted to participate. But actual favoritism need not exist to warrant an exclusionary effort by government. The Supreme Court has recognized a legitimate government interest in avoiding the very appearance of favoritism even when none exists.[46] Indeed, it is highly significant that union leaders who had access to information and were presumably aware of the reasons prompting the inclusion of advocacy groups in the 1983 CFC still attributed the action to partisan motives. Suspicions harbored by national union leaders suggest that it may prove

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[44] *See* Statement of AFL-CIO, *supra* note 33.

[45] *See* Letter of William Winpisinger, *supra* note 29.

[46] *See, e.g., United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973).

difficult indeed to persuade rank-and-file employees of the federal civil service that the inclusion of advocacy groups, particularly one with which an employee happens to disagree, did not occur for political reasons.[47]

III.

Finally, I turn to the argument, not relied upon by the majority, that exclusion of advocacy groups is not "viewpoint neutral" and is therefore impermissible even in a nonpublic forum.[48] The President's Executive Order ex-

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[47] Many letters from federal employees attacked the Administration for political favoritism. *See, e.g.*, Letter of Alice Shabecoff to the Combined Federal Campaign (November 22, 1982). II J.A. 370.

The majority opinion argues that the inclusion of an organization like the Olympic Committee makes the exclusion of litigation advocacy groups unreasonable. First, on this record it is impossible to know what the Olympic Committee does with money it received from the CFC. The record is devoid of any evidence whatever as to the scope of the activities of this committee. Second, there is no evidence that the inclusion of organizations like the Olympic Committee causes dimunition in charitable revenue, threatens the campaign's future success, distracts employees from their primary duties, and raises doubts of political favoritism in the way that the inclusion of advocacy groups does. Thus, *at least on this record*, the government is reasonable in excluding advocacy groups and yet not excluding groups like the Olympic Committee.

[48] Appellees also contend that the exclusion is unconstitutional because it was motivated by a desire to suppress speech. That raw assertion cannot support the judgment below. First, as the government vigorously disputes these characterizations of motivation with supporting record evidence, such an argument cannot form the basis of a decision granting summary judgment. Second, *Perry* suggests that an illicit motivation will not render the restriction unconstitutional so long as the restriction can be justified on objective grounds. "[T]he state may reserve the forum for its intended purpose . . . as long as the regulation or speech is reasonable and not an effort to suppress expression *merely* because public officials oppose the speaker's view." 103 S. Ct. at 955 (emphasis added).

cludes groups which are trying "to influence the outcomes of elections or the determination of public policy through political activity, advocacy, lobbying or litigation on behalf of parties other than themselves . . . ." Exec. Order No. 12,404 § 1(b), 48 Fed. Reg. 6,685 (1983). Since the exclusion operates to prevent groups which are advancing political or policy concerns through certain enumerated means, no matter what those concerns are, appellees cannot plausibly claim that the restrictions on access discriminate on the basis of political viewpoint, as commonly understood. Instead, appellees contend that the order violates "viewpoint neutrality," because it discriminates against groups that choose to promote human welfare by litigation rather than other methods.

Litigation, however, is generally understood to be a means of obtaining a goal or promoting a viewpoint, rather than a viewpoint itself. Even if appellees' argument is construed as the claim that they are engaged in advancing the implicit message that litigation is an excellent method of promoting human welfare, Supreme Court precedent demonstrates that restricting such a message does not constitute viewpoint discrimination. For instance, it might well be believed that partisan political activities promote human welfare; yet the Court has upheld restrictions that prohibit public employees from expressing their views on public affairs if the expression is directed toward party success "on the grounds that such restrictions are not aimed at particular parties, groups, or points of view." *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 556 (1973). Similarly, some might think that a completely non-censorious approach to materials dealing with human sexuality would promote human welfare; yet the Court upheld zoning restrictions on theaters displaying sexually explicit movies on the grounds that the restrictions "[are] unaffected by whatever social, political, or philosophical message a film may

be intended to communicate." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion). In this case, the restriction on the CFC is unaffected by the "social, political, or philosophical message" that groups wish to convey through "advocacy, litigation, or lobbying." As in *Young*, the restriction here is permissible.

IV.

None of the six Administrations that have conducted the federal charitable drive have voluntarily included advocacy groups. From this record, it appears that private employers generally do not allow advocacy groups to participate in the charitable drives conducted in their workplaces. Local administrators of the CFC from across the Nation attest persuasively to the fact that advocacy groups at a bare minimum befoul the atmosphere needed to conduct a successful charitable campaign. Their comments complain vehemently about the extra burdens imposed upon federal resources by inclusion of litigation advocacy groups. Non-government experts who know first-hand how to appeal to the human wellsprings of charitable giving protest that advocacy groups should not participate in the CFC.

The majority evidently thinks it possesses an expertise which enables it to dismiss this accumulated wisdom from diverse and experienced sources, abundantly documented in the record, and to conclude that the government's restrictions are so blatantly unreasonable that they merit judicial disapprobation without benefit of trial. Convinced that I am not possessed of such expertise, and persuaded that the Constitution neither demands nor warrants today's result, I respectfully dissent.

ADDENDUM A

September 15, 1982

The President of the United States
The White House
Washington, D.C. 20500

Dear Mr. President:

The Board of Governors of United Way of America, acting through its Executive Committee, has adopted the enclosed Resolution respectfully requesting Presidential action to amend Executive Order 12353 to limit eligibility for the Combined Federal Campaign to charitable agencies providing direct, human-care services in the fields of health and welfare, including health research.

When Executive Order 12353, restructuring the Combined Federal Campaign, was issued on March 23, 1982, there were high hopes in your Administration that it would mark the beginning of a new era of cooperative effort and support for the program's charitable purposes. Certainly, those hopes were shared by the some twenty million dedicated volunteers in United Way organizations across the nation.

Unfortunately, the Executive Order and the implementing regulations issued by the Director, U.S. Office of Personnel Management, have had an opposite and I am sure, unintended affect.

We now find that the Combined Federal Campaign has become a source of intense controversy because of admission to the campaign of organizations whose principal purpose is other than the providing of direct human-care services and health research to persons and families in need of such services.

Illustrative of the controversy is that organized labor, because of the admission to the campaign of the National

Right To Work Legal Defense Foundation, now regards the campaign as having departed from its original charitable purpose of support for human-care services. As a result, some unions with hundreds of thousands of members including the National Association of Letter Carriers, have taken the position that the Combined Federal Campaign is no longer deserving of employee support and have directed a boycott of the campaign.

The implications of these actions by organized labor can and do extend beyond the Combined Federal Campaign. Until now, in the cause of charity, leaders of government, industry, and labor have been able to put aside any difference between them on other matters. They have come together at the workplace in a social compact to assist the less fortunate in our society through support of charitable endeavors such as the Combined Federal Campaign as well as the annual nationwide United Way campaign. To jeopardize that compact appears clearly to run contrary to the national interest and to the goals of your Administration.

Mr. President, on behalf of the more than 37,000 charitable health and welfare agencies that are participating members of United Way, we urge favorable consideration and appropriate action to clarify and amend Executive Order 12353.

Sincerely,

/s/ Donald V. Seibert
Chairman,
Board of Governors
United Way of America

ADDENDUM B

Federal Executive Board
of Greater St. Louis, Missouri

Office of the Director

January 12, 1983

Dr. Donald Devine
Director
Office of Personnel Management
1900 "E" Street, N.W.
Washington, D.C. 20415

Dear Dr. Devine:

The 1982 East-West Gateway CFC raised $1,326,000 which exceeded the 1981 total by $39,000 even though participation declined by approximately four percent.

From the onset it became apparent that this year's drive would be very difficult, especially after 1981's problems with the National Association of Neighborhood Schools (NANS). This year NANS again picketed the Federal buildings; however, after a meeting with their chairman and the CFC chairman they agreed to stop picketing and passing out the handbills. They are still adamant and will no doubt be active next year. The threat of boycott by unions was real. Only by hard work were we able to gain their outward support, but many of the rank and file members still reacted negatively.

The steering away from the traditional health and welfare groups could spell the demise of the CFC as we have grown to know it. The loaned executives and key persons must at times face groups of employees who are staunch union members and they must overcome a negative attitude caused by CFC inclusion of advocacy groups.

To be ultimately successful in a general fund drive all agencies must be noncontroversial. When advocacy

groups or groups that stir up negative feelings because of religious or union affiliation are present, we place an undue stumbling block in the path of many potential givers.

There is a growing concern on the part of Federal officials that if the CFC does not remove many of the controversial organizations, dire results will occur. Many people are looking for a chink in the CFC armor, and it appears that by including advocacy groups we play into their hands; and we provide the "I'll give at home" individual the excuse for not participating.

We strongly urge the OPM [to] exert maximum efforts to exclude "all" advocacy groups from the 1983 program.

Sincerely,

/s/ Sidney M. Ford
Chairman

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1983

No. 83-1822
Civil Action No. 83-00928

NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., ET AL.

v.

DONALD J. DEVINE, DIRECTOR, U.S. OFFICE OF PERSONNEL MANAGEMENT, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: WRIGHT, EDWARDS and STARR, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion for the Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: FEBRUARY 17, 1984

Opinion for the Court filed by Circuit Judge Edwards.

Dissenting opinion filed by Circuit Judge Starr.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1983

No. 83-1822
Civil Action No. 83-00928

NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., ET AL.

v.

DONALD J. DEVINE, DIRECTOR, U.S. OFFICE OF PERSONNEL MANAGEMENT, APPELLANT

Before: WRIGHT, EDWARDS and STARR, *Circuit Judges*

ORDER

On consideration of Appellant's Petition for Rehearing, filed April 2, 1983, it is

ORDERED by the Court, that the aforesaid Petition for Rehearing is denied.

Per Curiam
For the Court:

GEORGE A. FISHER, *Clerk*
BY: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Starr would grant the petition for rehearing.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1983

No. 83-1822
Civil Action No. 83-00928

NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., ET AL.

v.

DONALD J. DEVINE, DIRECTOR, U.S. OFFICE OF PERSONNEL MANAGEMENT, APPELLANT

Before: ROBINSON, *Chief Judge;* WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, *Circuit Judges*

ORDER

The Suggestion for Rehearing *en banc* of Appellant, filed April 2, 1984, has been circulated to the full Court and a majority of the Judges in regular active service have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion for Rehearing *en banc* is denied.

Per Curiam
For the Court:

GEORGE A. FISHER, *Clerk*
BY: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Wilkey, Bork, Scalia and Starr would grant the Suggestion. A statement of Circuit Judge Starr, joined by Circuit Judges Wilkey, Bork and Scalia, is attached.

Chief Judge Robinson and Circuit Judges Wald and Mikva did not participate in this order.

No. 83-1822

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL.

v.

DONALD J. DEVINE, DIRECTOR, OPM

STARR, *Circuit Judge*, with whom WILKEY, BORK, and SCALIA, *Circuit Judges*, join:

The Combined Federal Campaign ("CFC") is an important and laudable institution which, as the exclusive mechanism for charitable solicitation in federal workplaces across the country, has provided millions of dollars to assist the needy and the infirm. While the panel's specific holding invalidated the exclusion only of legal defense funds from the CFC, its invocation of the funds' 501(c)(3) tax exempt status as the linchpin of its analysis will make it difficult, if not impossible, for the federal government to exclude on a principled basis any of the hundreds of thousands of organizations across the country that enjoy 501(c)(3) status. The decision thereby fundamentally alters the nature of the CFC, which through six different Administrations has attempted to limit participation to traditional charities providing direct health and human welfare services of the CFC to the needy. This alteration has already resulted in, among other things, a nationwide boycott of the CFC by the International Association of Machinists and Aerospace Workers.

The majority opinion accomplishes this damaging transformation of the federal charitable drive through a transformation of the public forum doctrine in First Amendment analysis. In my view, an *en banc* hearing is needed for three reasons: because of the enormous potential impact of this case on the CFC; because of its

critical misinterpretation of important First Amendment doctrine; and because of its misapplication of the standard for affirming the grant of summary judgment on appeal. For the reasons more fully elaborated in my dissenting opinion, this case clearly merits full consideration by the entire court.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0928

NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS,

v.

DONALD J. DEVINE, DIRECTOR,
UNITED STATES OFFICE OF PERSONNEL
MANAGEMENT, DEFENDANT.

MEMORANDUM OPINION

In this action, plaintiffs challenge their threatened exclusion from participation in the Combined Federal Campaign (CFC), an annual charitable fund-raising drive conducted by the federal government among its employees. The CFC is the only means by which charitable organizations may solicit contributions from federal employees or military personnel at their workplaces or duty stations. Plaintiffs are non-profit, tax-exempt charitable organizations within the meaning of section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). Each plaintiff engages in litigation and other activities with the purpose of protecting the environment advancing the civil rights of a particular group of minorities or women. They have been referred to generally as "legal defense funds." Defendant is the Director of the Office of Personnel Management (OPM), the agency under whose auspices the CFC is conducted. Plaintiffs essentially argue that a new Executive Order having the objective of denying legal defense funds the opportunity to participate in the CFC violates

their asserted first amendment right to engage in charitable solicitation. As plaintiffs put it, the "basic issue" of this case is whether they, like other CFC participants, will be allowed to have their "30-word" informational statement included in the annual campaign brochure. This Court previously denied plaintiffs' motion for a preliminary injunction and defendant's motion to dismiss. This matter is now ripe for decision upon plaintiffs' motion for summary judgment which, along with their renewed request for a preliminary injunction, was argued on July 6, 1983. For the reasons which follow, the Court grants plaintiffs' motion for summary judgment in part and dismisses the action in part, the renewed request for preliminary injunctive relief being denied as moot.

The CFC was created by President Kennedy through Executive Order 10927, on March 18, 1961. Exec. Order No. 10,927, 3 C.F.R. 454 (1959-63 Compilation). How it operates is described in greater detail in *NAACP Legal Defense and Educational Fund, Inc.* v. *Campbell*, 504 F. Supp. 1365 (D.D.C. 1981) [hereinafter referred to as *NAACP LDF I*] and *NAACP Legal Defense and Educational Fund, Inc.* v. *Devine*, 560 F. Supp. 667 (D.D.C. 1983) [hereinafter referred to as *NAACP LDF II*]. At one time legal defense funds such as plaintiffs were excluded from participation in the CFC because of the "direct services" requirement. The direct services requirement limited participation in the CFC to charitable organizations "providing direct services to persons in the fields of health and welfare services." *NAACP LDF I*, 504 F. Supp. at 1366 (quoting *Manual on Fund-Raising Within the Federal Service for Voluntary Health and Welfare Agencies* § 5.21).

Two of the plaintiffs in the instant action challenged that direct services requirement on, among other grounds, the ground that it abridged their first amendment right to engage in charitable solicitation. *NAACP*

LDF I, 504 F. Supp. at 1366. Agreeing with the plaintiffs that the direct services requirement impinged upon the plaintiffs' first amendment rights, Judge Gesell struck down the requirement as "too vague to comport with the strict standards of specificity" required in the first amendment context. *Id.* at 1366-67. Thereafter, all of the plaintiffs in the instant action applied and were permitted to participate in the CFC for 1981 and/or 1982 as "national service agencies." Executive Order 10927 was superceded by Executive Order 12353 on March 23, 1982, 47 Fed. Reg. 12785 (1982); the new order did not affect plaintiffs' ability to participate in the CFC.

On February 10, 1983, however, Executive Order 12353 was amended by Executive Order 12404, which had the objective of reinstating the direct services requirement, but with the constitutionally-required specificity that the previous such requirement was found to lack in *NAACP LDF I*. It states that

> eligibility for participation in the Combined Federal Campaign shall be limited to voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families. Such direct health and welfare services must be available to Federal employees in the local campaign solicitation area, unless they are rendered to needy persons overseas. Such services must directly benefit human beings, whether children, youth, adults, the aged, the ill and infirm, or the mentally or physically handicapped. Such services must consist of care, research or education in the fields of human health or social adjustment and rehabilitation; relief of victims of natural disasters and other emergencies; or assistance to those who are impoverished and therefore in need of food, shelter, clothing, education, and basic human welfare services.

Exec. Order No. 12,404 § 1, 48 Fed. Reg. 6685 (1983). The Executive Order also provides that "Agencies that seek to influence the ... determination of public policy through ... advocacy, lobbying or litigation on behalf of parties other than themselves shall not be deemed charitable health and welfare agencies and shall not be eligible to participate in the Combined Federal Campaign." The announced purpose of the Executive Order's instruction that a direct services requirement be reimposed was to exclude legal defense funds from the CFC, identifying as such several of the plaintiffs in this action. Devine Memorandum of Feb. 2, 1983, *"New Executive Order for the Combined Federal Campaign,"* Exh. K to Ralston Affidavit.

According to defendant, the participation of some organizations in the past had resulted in controversy and threatened boycotts of the campaign. For example, various labor groups expressed their opposition to the including of the National Right to Work Legal Defense Foundation in the CFC and warned defendant of potential boycotts as a result. Chairpersons of some local CFC committees also advised defendant of their concerns that contributions to the CFC might decline because of the presence in the campaign of organizations involved in such issues as integration and abortion, as well as "right-to-work."

Plaintiffs argue that the reinstated direct services requirement suffers from the same vagueness defect as the rule at issue in *NAACP LDF I*. They also argue that because the CFC is a "limited public forum," the Executive Order's exclusion of organizations "that seek to influence ... the determination of public policy through ... advocacy, lobbying, or litigation on behalf of parties other than themselves" is an unconstitutional infringement upon their first amendment rights. Furthermore, they assert that the order violates their guarantee to equal protection of the laws. Defendant

contends that the vagueness challenge is premature inasmuch as any such deficiency could be cured, in defendant's view, by the promulgation of implementing regulations containing the needed specificity. This argument has merit: proposed regulations to implement Executive Order 12404 were announced on June 24, 1983 for a 30-day notice and comment period. Yet the substantive first amendment issues raised by the Executive Order are ready for judicial review at this time, for the reason that no regulation could remove the allegedly unconstitutional exclusion and remain consistent with the Executive Order.

It is important to note that the CFC provides employees with two ways in which to make contributions, inasmuch as (for reasons which will be explained below) plaintiffs' first amendment rights differ with respect to these two methods. An employee may designate that his donations be distributed to particular organizations participating in the CFC. Alternatively, if the employee does not designate any agency to benefit from the donation, the amount contributed is placed into a pool which is divided among the approved agencies in accordance with a formula set forth in the regulations. *See NAACP LDF II*, 560 F. Supp. at 670.

I. PLAINTIFFS' FIRST AMENDMENT RIGHTS

The solicitation of charitable contributions involves interests protected by the first amendment's guarantee of freedom of speech. *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 629. At least with respect to designated funds, this principle applies to the CFC: by engaging in solicitation throughout the campaign, an organization seeks to persuade an employee to make a donation to that organization. *See NAACP LDF I*, 504 F. Supp. at 1637, *see also NAACP LDF II*, 560 F. Supp. at 675. Yet the same interests are not present in the making of undesignated contributions. An employee's decision to make a general undesignated donation is not motivated by the same considerations as a decision to designate a contribution. Such a decision is not a response to a particular organization's solicitation activities in the same way that a decision to make a designated contribution is, for the reason that he yields to the CFC all control over how that money is to be disbursed.

This was the basis for this Court's decision in *NAACP LDF II* that denying plaintiffs the eligibility to receive undesignated funds did not violate their first amendment right to engage in charitable solicitation. This Court found *NAACP LDF II* "quite a different case" from *NAACP LDF I*, noting that while the opportunity for the plaintiffs to receive designated contributions was ensured by the prior decision, "[b]y contrast, a donor making undesignated contributions elects to express no preference that his money should be distributed in part to plaintiffs; rather all he is saying is that his money should go to the public good." 560 F. Supp. at 675. Accordingly, with regard to undesignated funds, plaintiffs' claim appears to be more properly the subject of an equal protection analysis than first amendment scrutiny.

Where the government has created a forum for activities involving free speech, reasonable time, place, and manner restrictions are permissible, but any content-based prohibition must be "narrowly drawn to effectuate a compelling state interest." *Perry Education Association* v. *Perry Local Educators' Association*, 103 S. Ct. 948, 955 (1983), *see also Police Department of Chicago* v. *Mosely*, 408 U.S. 92, 96 (1977). Attempting to analogize the CFC to the school internal mail system found not to be a public forum by the Supreme Court in *Perry Education*, defendant argues that the CFC is not a public forum and that therefore plaintiffs have no right to participate in it, because access to the campaign is limited to certain types of groups.

It is clear that the CFC does constitute a public forum to the extent that it permits numerous charitable organizations to present their messages to federal employees. As Judge Gesell found, "by providing organizations the opportunity to participate in the CFC, the government has, in effect, provided a billboard or channel of communication through which organizations can disseminate their appeals to federal workers." *NAACP LDF I*, 504 F. Supp. at 1367. As defendant recently explained to the Subcommittee on Manpower and Housing of the House Committee on Governmental Operations, charitable appeals at federal facilities existed prior to the creation of the CFC through executive Order 10927, but on an unregulated basis that caused disruption in the workplace and did not provide charitable organizations with an efficient, consistent means of soliciting contributions. Devine Statement to Subcommittee on Manpower and Housing at 2-3 (Mar. 24, 1983), Attachment C to Motion to Dismiss. Since charitable solicitation in the federal workplace predated the CFC, Executive Order 10927 did not open the door to such activities, but placed guidelines upon how those activities would be conducted. The CFC therefore became the exclusive forum for charitable solicitation in the federal workplace. Accordingly, the CFC is a limited public forum to which the above-noted limitations upon governmental regulations apply.

Moreover, plaintiffs do fall within the limits of that forum as it historically has existed. Executive Order 10927 made no differentiation among charitable organizations on the basis of how they accomplish their objectives. Exec. Order No. 10,927, 3 C.F.R. 454 (1959-63 Compilation). Certainly the CFC's provision precluding charitable organizations from any other access to government employees at their workplaces would prevent plaintiffs from undertaking such solicitation outside of the campaign. The limited public forum created by the

CFC embraces plaintiffs and therefore any restriction upon their participation is subject to the constitutional requirements set forth above.

Plaintiffs argue, persuasively, that the restriction at issue here is a content-based prohibition that must survive close scrutiny in order to be upheld. There is no doubt that the exclusion's focus is the type of activity engaged in by certain organizations. Those organizations that exercise their right, *see NAACP* v. *Button*, 371 U.S. 415, 428-29 (1963), to seek to change policy and obtain legal redress for wrongs through litigation and other means are to be barred from participation in the CFC under the new Executive Order. As the "expression" protected under the first amendment in an act of charitable solicitation is a request for contributions, the "content" of that expression is the accompanying statement of how those contributions will be used. It is this "content" that has, according to defendant, engendered such controversy among potential contributors as to warrant the exclusion based thereupon. *See, e.g.*, OPM Press Release, "President Orders Federal Drive to Focus on Charity for Truly Needy" (Feb. 10, 1983) at 2, Exh. A to McClure Affidavit [hereinafter cited as "OPM Press Release"] (quoting defendant, who noted a "'[s]entiment favoring a wholesale boycott of the CFC'").

Nor does defendant's characterization of this exclusion as a "viewpoint-neutral" restriction change the fact that it is a content-based prohibition requiring close scrutiny. The Supreme Court rejected a similar argument in *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530 (1980). The Court squarely ruled that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." 447 U.S. at 537. Consequently, it is of no moment that "'the advocacy

groups, both left and right . . . will be excluded from the campaign.'" OPM Press Release at 2, Exh. A to McClure Affidavit (quoting defendant).

The next issue to consider is whether the new requirements for eligibility to participate in the CFC are "narrowly drawn to effectuate a compelling state interest." The enumerated purposes of Executive Order 12404 are: (1) "to lessen the burdens of government and of local communities in meeting needs of human health and welfare," (2) "to provide a convenient channel through which federal public servants may contribute to these efforts," (3) "to minimize or eliminate disruption of the Federal workplace and costs to Federal taxpayers that such fund-raising may entail," and (4) "to avoid the reality and appearance of the use of Federal resources in aid of fund-raising for political activity or advocacy of public policy, lobbying, or philanthropy of any kind that does not directly serve needs of human health and welfare." Exec. Order No. 12,404 § 1. Of these, only the fourth objective is directly related to the exclusionary provision at issue here.

In his March 24, 1983 statement to the Subcommittee on Manpower and Housing, defendant explained that the motivation for the restriction in question was the controversy allegedly being engendered by the presence of legal defense funds and "advocacy groups" in the CFC. Devine Statement to Subcommittee on Manpower and Housing at 5. According to defendant, "participation in the Campaign by these groups provoked increasing concern and even outright hostility." *Id.* Defendant stated that a "torrent" of complaints concerning the groups' participation in the CFC were made to OPM by the end of the 1982 campaign. *Id.* Employees, defendant asserted, "were outraged, and not without justification" that federal resources were being deployed in aid of such organizations. *Id.* at 6. He declared that "We were told [in the letters of complaint to

OPM], in no uncertain terms, that unless the Campaign were reformed, employee boycotts—some concerted, others passive, but all of them devastating—would bring the life of the Campaign to an end." *Id.*

Not only is the assertedly "controversial" nature of plaintiffs' purposes not a compelling governmental interest, it is an *impermissible* basis for a restriction upon speech. "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street* v. *New York*, 394 U.S. 576, 592 (1969). There is no doubt that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Department of Chicago* v. *Mosely*, 408 U.S. at 96.

Defendant argues that the asserted interest in "avoid[ing] the . . . use of Federal resources in aid of fund-raising for" the various types of activities deemed not to constitute "direct services" is supported by the recent decision of the Supreme Court in *Regan* v. *Taxation With Representation of Washington*, No. 81-2338 (U.S. May 23, 1983). In that case, the Court held that section 501(c)(3) of the Internal Revenue Code, which prohibits an organization from using tax-deductible contributions to support substantial lobbying activities, did not infringe any right or regulate any activity under the first amendment. *Id.*, slip op. at 5. To allow tax-deductible contributions to be used for lobbying purposes would be equivalent to a federal subsidy for that activity, the Court held, and "Congress is not required by the First Amendment to subsidize lobbying." *Id.* The instant case is distinguishable. It does not involve the question of a subsidy for plaintiffs' litigation and other advocacy activities—the issue raised by defendant here merely concerns the benefits which would inure to plaintiffs as well as all CFC participants as a re-

sult of the government's assumption of the task of operating the campaign. But the government did not accept the responsibility to conduct the CFC because of a desire to confer a benefit upon the various charitable organizations participating therein; rather, as explained above, it did so in order to regulate the many charitable appeals being made to federal employees at their workplaces. *See* Exec. Order No. 10,927 § 2(b) (authorizing predecessor of OPM Director to designate specific periods in which solicitations may be conducted and limit number of solicitations to three per year). The cost of operating the CFC is the price for creating this exclusive channel by which charitable appeals may be made.

As the government's desire to avoid the *appearance* of using federal resources to support the legal defense fund's fundraising efforts, total exclusion from the CFC certainly is not the least restrictive alternative that could have been imposed. While plaintiffs cannot be excluded from the CFC, the government may, if it desires, insert into campaign materials a *neutral* statement to the effect that its role in the CFC is simply to disseminate information and facilitate the making of donations. This would be sufficient to convey the government's desire not to endorse the making of contributions to any particular organization.

The only legitimate interest that the government can properly assert that pertains to the alleged opposition of employees to the participation of certain types of groups in the CFC is the protection of the employee's right not to contribute. *NAACP LDF II*, 560 F. Supp. at 676. But that problem only arises in the case of undesignated contributions. Therefore to the extent that the exclusion at issue could be considered to be directed at this interest, it is not as narrowly drawn as it might be in that it applies to designated contributions as well.

In light of the foregoing, the Court holds that, as far as it applies to the making of designated contributions, the directive in Executive Order seeking to reinstate a direct services requirement is contrary to plaintiffs' first amendment right to engage in charitable solicitation in a limited forum. Therefore, defendant shall be enjoined from denying pending or future application of plaintiffs to participate in the CFC for the solicitation of designated contributions.

II. EQUAL PROTECTION CONSIDERATIONS

As noted above, plaintiffs' exclusion from participation in the CFC with respect to undesignated contributions appears to be more appropriately subject to an equal protection analysis rather than first amendment review. The fact that first amendment activity is a primary part of each plaintiff's mission arguably situates the plaintiffs differently from those organizations in the CFC who do not engage in such activity, in view of the first amendment rights of employees who make undesignated contributions. *NAACP LDF II*, 560 F. Supp. at 676-77. Ensuring that the CFC is operated in such a way as to protect those rights is a legitimate governmental interest. However, as final regulations implementing Executive Order 12404 have yet to be promulgated it is premature to consider whether the means by which the government might carry out that interest are proper. Accordingly, as far as plaintiffs' action concerns their access to undesignated funds, this cause will be dismissed without prejudice.

III. PRELIMINARY RELIEF

Plaintiffs' request for preliminary injunctive relief is, of course, moot as it pertains to their ability to make their appeal for support through the CFC and receive designated contributions as a result. With respect to the question of plaintiffs' eligibility to receive undesig-

nated contributions, a preliminary injunction is not warranted.

The standards governing the issuance of such relief are well-known and set forth in *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). *See also Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841 843 (D.C. Cir. 1977). The factors which comprise those standards are (1) likelihood of success on the merits, (2) irreparability of harm, (3) detriment to third parties, and (4) where the public interest lies. During this litigation, the parties generally have focused their attention on the question of the plaintiffs' right to engage in charitable solicitation in the CFC rather than the issue of their eligibility to share in undesignated funds. As explained above, any right plaintiffs might have to access to undesignated contributions is much less than their right to solicit designated contributions through the CFC. On the question of access to undesignated funds, then, plaintiffs have not shown a strong likelihood of success on the merits. As to the second factor, inasmuch as undesignated funds are not distributed from their pool until after the annual campaign is concluded, it cannot be said that plaintiffs would be irreparably harmed should injunctive relief not issue at this time. Such relief could work to the detriment of other organizations eligible to receive undesignated funds for the reason that assuming defendant's characterization of the public outcry arising from plaintiffs' participation in the CFC is accurate, some employees may elect not to make the undesignated contributions they otherwise might make. Finally, it has not been shown why the public interest would require the issuance of this relief. Therefore, it is denied.

An Order consistent with this Memorandum Opinion shall be entered this date.

/S/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

JULY 15, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0928

NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS,

v.

DONALD J. DEVINE, DIRECTOR,
UNITED STATES OFFICE OF PERSONNEL
MANAGEMENT, DEFENDANT.

ORDER

Consistent with the Memorandum Opinion entered in this action this date, it is, by the Court, this 15th day of July, 1983,

ORDERED, that plaintiffs' motion for summary judgment shall be and hereby is granted in part and denied in part, as explained in the Memorandum Opinion, and it is

FURTHER ORDERED, that defendant, his agents and subordinates, shall be and hereby are permanently enjoined from excluding plaintiffs from participation in the Combined Federal Campaign with respect to the solicitation of "designated contributions," as that term is used in this Memorandum Opinion, on the basis of the provisions of section (2)(b)(1 through 3) of Executive Order No. 12353, as amended by section 1(b) of Executive Order No. 12404 of February 10, 1983, and it is

FURTHER ORDERED, that to the extent that plaintiffs' complaint concerns their right to receive "undesignated contributions," as that term is used in the Memorandum Opinion, that claim is dismissed without prejudice, and it is

FURTHER ORDERED, that plaintiffs' request for preliminary injunctive relief shall be and hereby is denied.

This cause stands closed.

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

MOTION FILED

SEP 28 1984

No. 84-312

IN THE

Supreme Court of the United States

October Term, 1984

DONALD J. DEVINE, Director
OFFICE OF PERSONNEL MANAGEMENT, *Petitioner,*

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE UNITED BLACK FUND OF AMERICA, AMERICAN CANCER SOCIETY (District of Columbia Division, Chesapeake-Potomac Area, Montgomery County Unit, and Northern Virginia Area Office), AMERICAN RED CROSS (District of Columbia Chapter), BOYS AND GIRLS HOMES OF MONTGOMERY COUNTY, BOY SCOUTS OF AMERICA (National Capital Area Council), LUTHERAN SOCIAL SERVICES OF THE NATIONAL CAPITAL AREA, SALVATION ARMY (National Capital Area), VISITING NURSES ASSOCIATION OF NORTHERN VIRGINIA, CENTER CITY COMMUNITY CORPORATION and THE UNITED BLACK FUND OF GREATER WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The above-named charitable and philanthropic organizations move for leave to file a brief *amici curiae* in support of the petition for a writ of certiorari in this action. If allowed to stand, the decision below will impede these and other similar charitable organizations in attaining their goals of providing health and welfare services directly to persons in need. These organizations support

the government's petition and, because of their unique perspective and the particular effect the decision below has on them, they seek to file the accompanying brief *amici curiae* in order to bring before the Court certain considerations which were not stressed by the government and which they believe will be important to the Court in deciding whether to grant the petition.

All of the above-named organizations, as more fully set out in the Appendix to the accompanying brief, are traditional eleemosynary organizations dedicated to providing direct health or welfare service to persons in need, and all are long-time participants in the Combined Fedeal Campaign. Since the decision below will serve only to diminish the effectiveness of the entire Campaign with the result that *amici,* their program beneficiaries, and ultimately society as a whole will suffer, these organizations urge this Court to grant their motion and consider their views.

Respectfully submitted,

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QUESTION PRESENTED

Whether Executive Order No. 12,404, which preserves the Combined Federal Campaign for its intended purpose of supporting traditional human health and welfare charity and thus excludes legal advocacy and certain other groups, violates the First Amendment.

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The United Black Fund of America, American Cancer Society (District of Columbia Division, Chesapeake-Potomac Area, Montgomery County Unit and Northern Virginia Area Office), American Red Cross (District of Columbia Chapter), Boys and Girls Homes of Montgomery County, Boy Scouts of America (National Capital Area Council), Lutheran Social Services of the National

Capital Area, Salvation Army (National Capital Area), Visiting Nurses Association of Northern Virginia, Center City Community Corporation, and the United Black Fund of Greater Washington submit this brief *amici curiae* to urge that the Court grant certiorari to resolve the important questions presented by this case relating to Executive Order 12,404 and to correct the D.C. Circuit's erroneous reading and application of this Court's "public forum doctrine." If left uncorrected, the decision below will have damaging and far-reaching effects on the important federal program at issue here, as well as countless other federal activities. Furthermore. the implications of the decision below will affect charitable fund raising in state and local government as well.

INTEREST OF AMICI

Amici represent a cross-section of humanitarian charitable organizations dedicated to providing health and welfare services directly to persons in need. They include national organizations, community chapters and divisions of national organizations, and strictly local organizations, and they provide human health and welfare services in a variety of ways including cancer research and patient services, disaster relief, in-home and day care for the elderly and infirm, youth development activities and food, shelter, and basic life necessities for the homeless.[1] While the precise focus of each *amicus* organization differs, they are nonpolitical, nonpartisan organizations dedicated to humanitarian service. Their purposes are recognized by citizens as community-wide concerns and there is a general consensus among federal employees and citizens that these organizations serve a necessary and desirable function.

[1] A description of each organization joining in this brief is submitted in the Appendix to this brief. While each *amicus* organization provides services in the Washington, D.C. metropolitan area, and some do so exclusively, these organizations have counterparts in communities nationwide.

In addition to being charitable organizations with the time-honored purpose of providing direct health and welfare services to persons in need, and thus fostering the well-being of the entire community, each *amicus* organization is a long-time participant in the Combined Federal Campaign ("Campaign"). These organizations, and particularly local organizations such as the United Black Fund and the Center City Community Corporation, obtain a substantial portion of their funding through the Campaign. *Amici* depend on the strength, viability and general acceptance of the Campaign among contributors. Because the decision of the court below is constitutionally unsound and poses a significant threat to the Campaign's well-being, they urge this Court to review that decision and set it aside.

Specifically, if left undisturbed, the impact of the decision below will be to diminish the effectiveness of the Campaign as a means of harnessing the generosity of federal employees to support charitable endeavors. The strength of the Campaign depends on the good will of employees and their willingness to donate to the participant organizations. The inclusion of wholly different kinds of agencies lacking the general acceptance accorded *amici*, such as right-to-work and other legal advocacy groups, necessarily weakens employee confidence in the Campaign, and, in fact, has already resulted in employee boycotts. The court-mandated transformation of the Campaign from its original objective, to support human health and welfare charity providing direct services to per-

sons in need, into a vehicle for the support of a vast array of organizations devoted to fundamentally different objectives, threatens the success of the Campaign. *Amici's* concern is not that inclusion of additional groups in the Campaign will diminish the amount of funding they receive; rather *amici* are concerned that the Campaign as a whole will be harmed, thus shrinking the pool of resources available to provide direct assistance to persons in need. Because the anticipated damage has already occurred and the continuing threat is real and immediate, *amici* seek this Court's review.

REASONS FOR GRANTING THE PETITION

The decision of the court below has significant and far-reaching implications. Foremost, the court below improperly applied the "public forum doctrine." It ignored the rational basis standard which this Court has declared must be satisfied to justify a restriction of access to a nonpublic forum and instead constructed a much more stringent, though largely unarticulated standard that rarely, if ever, could be satisfied. The stringency of this new measure for judging activities which take place in nonpublic forums ensures that the courts, and not our elected officials, will in the future determine the contours of these activities and their participants. No such intrusive judicial role was intended by the rulings of this Court, with which the D.C. Circuit decision is irreconcilable. Flouting of the principles carefully formulated by this Court in this sensitive area of constitutional law cannot be tolerated. For this reason alone, further review here is needed.

Furthermore, if allowed to stand the decision below will impede *amici* and other similar charitable organizations in attaining their goals of providing direct health and welfare services to persons in need. At best, diminishment of *amici's* ability to meet their program aims will impose an additional burden on the government to step in where *amici* will now fall short; at worst, curtailment of *amici's* efforts will cause those in need of their services to go without critical assistance. So long as the Campaign is prevented from returning to its original role, *amici,* their program beneficiaries, and ultimately society as a whole, will suffer.

1. This case presents issues of substantial public importance. The decision below represents a radical departure from the rules and principles this Court has established for determination of "public forum" questions. The D.C. Circuit's ruling is predicated on the assertion that the standard of "reasonableness" applied in nonpublic forum cases (*see, e.g., Perry Education Ass'n v. Perry Local Educator's Ass'n,* 460 U.S. 37, 49 (1983)) is somehow different and more exacting than the "rational basis" test applied in equal protection analysis. In fact, the panel majority faulted the dissent for "inexplicably" applying a rational basis test. *See NAACP Legal Defense and Educational Fund, Inc. v. Devine,* 727 F.2d 1247, 1266 (D.C. Cir. 1984). Yet in *Perry,* this Court explicitly stated that exclusions from a nonpublic forum "need only rationally further a legitimate state purpose." 460 U.S. at 54. *See, also, Jones v. North Carolina Prisioners' Labor Union,* 433 U.S. 119, 136 (1977) ("appellants need only demonstrate a rational basis for the distinctions between organizational groups.") This, of course, is the classic articulation of the "rational basis" standard. *See Dandridge v. Williams,* 397 U.S. 471, 485 (1970). In creating a more intrusive standard of review for nonpublic forum cases, the court below ignored the principles set out by this Court and instead required the Executive Order at issue to satisfy

a wholly different and indefensible standard of its own devising. The court's error must be corrected, as was urged by four of its members.[2]

The need for review by this Court becomes even more apparent when the analysis applied by the D.C. Circuit is examined. Assuming without deciding that the Campaign was a nonpublic forum, 727 F.2d at 1257,[3] the panel majority nonetheless found Exec. Order 12,404 "patently unreasonable and capricious" and thus constitutionally offensive. 727 F.2d at 1248. In reaching this conclusion, the panel majority found that the "status" of the excluded organizations was not legally different from the status of other included organizations. 727 F.2d at 1258. Thus, for example, the panel majority concluded that there was no difference in "status" between the NAACP Legal Defense and Educational Fund and the United States Olympic Committee, a "sports association[ ]" or "recreational societ[y]." 727 F.2d at 1259-60.

[2]The government's Suggestion for Rehearing *En Banc* was denied by an equally divided vote. *See* Petition for Certiorari at 80a.

[3]The District Court, 567 F.Supp. 401, 407 (D.D.C. 1983), and Circuit Judge Wright, 727 F.2d at 1268, concluded that the Campaign constituted a limited public forum. Even in a limited public forum, however, heightened scrutiny is mandated only as between "entities of similar character." *Perry* 460 U.S. at 48. Thus, even if the Campaign were construed to be a limited public forum, review in this case would hinge on whether reasonably, and factually, the excluded organization were "entities of similar character." For the reasons set out in Exec. Order 12,404, however, the excluded organizations are not such similar entities. At all events, *amici* agree with the government that the Campaign is at most a nonpublic forum. *See* Petition for Certiorari at 14-15 n. 14.

Whatever may be said about the accuracy of this observation,[4] it was inapposite to the resolution of the issue before the court. The issue before the D.C. Circuit was the facial validity of the Executive Order, *i.e.*, whether the Constitution requires that the President open the Campaign to organizations that do not have as their principal purpose service to the needy in the areas of human health and welfare. By failing to address this issue and instead focusing its inquiry on the application of the Order, even before the Order was implemented, the panel majority erred.

In contrast, the dissent recognized that to be constitutionally permissible, the restrictions imposed on participation in the Campaign needed only be "reasonable and neutral as to the viewpoint espoused by the 'speaker'." 727 F.2d 1268, 1274 (Starr, J. dissenting). The dissent accepted fully the legitimacy of the reasons proffered for the issuance of Exec. Order 12,404, *i.e.*, protection of the present and future success of the Campaign (thus lessening the government's responsibility to care for the needy), minimization of disruption in the federal workplace, and avoidance of the appearance of government favoritism toward certain legal and political advocacy groups. *Id.*, at 1276-77. As to the issue of "viewpoint neutrality," the dissent noted that Exec. Order 12,404 did not discriminate on the basis of political viewpoint, since the Order operated to exclude *all* groups which attempted "to influence the

[4]As the government notes in its petition, there is nothing in the record to demonstrate that the Olympic Committee would necessarily have qualified for inclusion under the regulations. *See* Petition for Certiorari at 17-18 n. 16. The panel majority erred in gauging the constitutionality of Exec. Order 12,404 on the comparison of entities which might or might not have properly been included in the Campaign.

outcome of elections or the determination of public policy through . . . litigation on behalf of others," regardless of political orientation. *Id.*, at 1281, *citing* Exec. Order 12,404 § 1(b), 48 Fed. Reg. 6685 (1983).

As this Court stated in *Perry*,

> on government property that has not been made a forum, . . . the [government] may draw distinctions which relate to the special purposes for which the property is used.

460 U.S. at 55. In this case the government has drawn such a distinction: the historical purpose of the Campaign was to support human health and welfare charity, and the government for reasonable, rational, and indeed compelling reasons, sought to restore it to that role. Because the court below impugned rather than deferred to the government's judgment on this sensitive matter, *North Carolina Prisoners' Union*, 433 U.S. at 128, and because in so doing it wholly transformed public forum analysis, review by this Court is warranted.

2. Beyond the doctrinal implications of the decision below, the practical consequences of that decision for the Campaign and for the government independently warrant this Court's consideration. The Campaign in its twenty-year history has developed into a multi-million dollar charitable fund raising effort. In fact, because of the number of federal employees, the Campaign accounts for a significant proportion of individual contributions made to charity nationwide.[5] Accordingly, anything which

[5]The Campaign is the single largest employee charitable fund-raising effort in the United States – in 1983, it raised almost 110 million dollars in contributions to various human health and welfare charities. *See* Office of Personnel Management Report, *CFC Results Report*, Table 1, at 1 (1983).

adversely affects the Campaign will have a detrimental impact on the many hundreds of participating humanitarian organizations and ultimately on the recipients of their services.

Specifically, the Campaign's success is due wholly to the good will of federal employees. For the last twenty years, federal employees have been voluntarily contributing to the Campaign, often designating no specific charity to receive their contributions, knowing that their gifts would go toward providing assistance to persons in need. The decision below, however, fundamentally alters the nature of the Campaign. No longer does the Campaign represent traditional human charity which federal employees have been willing to support generously. Instead, by virtue of the decision below, the Campaign now is open to virtually any "501(c)(3)" organization, *i.e.* any organization entitled to receive tax-deductible contributions under 26 U.S.C. § 501(c)(3), including legal advocacy and other special interest groups.

This is not to say that the purposes of these groups whose inclusion in the Campaign was mandated by the D.C. Circuit may not be laudable. But the impact of changing the Campaign from a mechanism for supporting traditional human health and welfare organizations whose purposes are approved by the vast majority of federal employees into one which supports virtually any "501(c)(3)" nonprofit organization, including those which may espouse controversial political and social causes, is to erode the good-will which the Campaign has generated among federal employees. The Campaign from its inception has had the unitary goal of directly supporting human health and welfare charity. As a result of the decision below, however, no longer is the Campaign a conduit for directly assisting those in need; rather it has now become a clearing

house servicing a hodgepodge of disparate organizations whose only common characteristic is their tax-exempt status.

That this change in the Campaign has tarnished it in the eyes of federal employees is borne out by several recent events. For example, inclusion of right-to-work groups in the Campaign resulted in boycotts by local unions, as well as a nationwide boycott by the International Association of Machinists and Aerospace Workers. *See* 727 F.2d at 1278.[6] Most ominously, while the total amount of contributions has increased nominally, the actual number of employees participating in the Campaign has decreased by one-third in recent years. *See Washington Post,* September 17, 1984, at A17, col. 3. The lifeblood of the Campaign is a supportive federal workforce; erosion of the Campaign's broad base of support threatens its very existence.

Furthermore, inclusion of all nonprofit groups in the Campaign has another adverse consequence. There are approximately 300,000 such organizations and even if only a portion of these participate in the Campaign the administrative costs of the program will significantly increase. Furthermore, as a practical matter, the Campaign would be inundated with organizations of divergent purposes and thus traditional health and welfare charities would be compelled to expend additional funds to convey their pur-

[6]The dissent below cites several other instances of boycotts and misgivings about the Campaign, *e.g.*, promises of future boycotts, attainment of contribution goals only after expenditure of extraordinary effort, "stumbling blocks" created by the inclusion of legal advocacy groups, etc. *See* 727 F.2d at 1277-79. *See, also,* 49 Fed. Reg. 32735 (1984) (summarizing comments voicing disapproval of the inclusion of political and legal advocacy groups in the Campaign.)

poses and message to potential contributors. Accordingly, less funding would be available to support human health and welfare charity, frustrating even further the historic purpose of the Campaign. Yet the ultimate frustration of the Campaign's purpose would be its court-ordered transformation from a support effort for human welfare into a collection agent for 300,000 tax-exempt organizations, most of which are unrelated in purpose and uncommitted to human welfare charity.

To the extent that the decision below has an adverse effect on the campaign, it consequently has an adverse impact on the government, and ultimately on society as a whole. One of the explicit purposes of Exec. Order 12,404 is to facilitate voluntary contributions to human health and welfare charities and thus "lessen the burdens of government and of local communities in meeting needs of human health and welfare." Because federal employees are continuing to lose confidence in the purposes and direction of the Campaign and because the Campaign accordingly will be hampered in its ability to deliver support for those in need, government at all levels will now be called upon to commit additional resources to meet these needs. At best, because of the decision below, the increased burden of meeting these needs will be shifted from contributions of federal employees to the taxpayers. At worst, the void left by the erosion of employee support for the Campaign will not be filled, and the burden will fall on those least able to bear it, the impoverished and disadvantaged. For this reason as well, review by this Court is warranted.

3. There can be no serious contention that the adverse consequences created by the decision below are in any way ameliorated or that the controversy here is mooted by the issuance of new regulations for the conduct of the 1985

Campaign. *See* 49 Fed. Reg. 32735 (1984). Foremost, the doctrinal aspects of the decision stand irrespective of the issuance of these new regulations. Thus, no matter what might happen to the Campaign, confusing and inconsistent precedent will have been set in this sensitive area of First Amendment law. With respect to the Campaign itself, however, the Office of Personnel Management ("OPM") was explicit, both in proposing the new regulations and in issuing the final regulations, in noting its intention to seek vindication of Exec. Order 12,404. *See* 49 Fed. Reg. 14572 (1984) (OPM "proposes to modify its regulations governing [the Campaign] in order to conform to court decisions that have, for the time being at least, invalidated on constitutional grounds key eligibility criteria"); 49 Fed. Reg. 32735 (1984) ("OPM has no choice but to establish revised rules governing the [Campaign] that conform to the controlling judicial pronouncements . . . OPM does so, of course, without prejudice to its right or duty further to modify the rules in the event of a supervening direction from a court . . ."). For these reasons, the questions presented by the decision below are viable, continuing questions which merit this Court's consideration.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

THE UNITED BLACK FUND OF AMERICA

The United Black Fund of America was incorporated in 1977 to develop and monitor black-oriented fund-raising organizations through out the nation. It currently has 27 chapters and affiliates within 20 states across the nation which serve the human health and welfare needs of the various communities in which they are located.

AMERICAN CANCER SOCIETY
(District of Columbia Division,
Chesapeake-Potomac Area,
Montgomery County Unit,
Northern Virginia Area Office)

The American Cancer Society is a voluntary organization dedicated to controlling and eradicating cancer. It provides practical help, emotional support and community health services to persons afflicted with cancer and their families. The American Cancer Society also initiates and supports lifesaving programs of research, education, service and rehabilitation. The local chapters involved here all provide services in the Washington, D.C. metropolitan area.

AMERICAN RED CROSS
(District of Columbia Chapter)

The American Red Cross, incorporated in 1917, is an emergency-oriented organization which is chartered by Congress. The District of Columbia Chapter delivers services to the metropolitan Washington, D.C. community such as providing trained volunteers who assist families to cope with emergencies such as flood, home fires, near drownings and other disasters. In addition, the Red Cross

provides casework services to members of our armed forces, veterans and their families, and fosters opportunities for youth leadership development. It also trains volunteers to assist in hospitals and nursing homes, to teach parents to care for newborn babies, to train first-aiders in lifesaving techniques, and to transport the indigent and elderly to clinics, hospitals and help them obtain other assistance they require. In addition, the District of Columbia Chapter of the American Red Cross operates a volunteer blood program which supplies approximately 85% of all blood used in the National Capital area.

BOYS AND GIRLS HOMES OF MONTGOMERY COUNTY

Incorporated in 1964, the Boys and Girls Homes of Montgomery County provides residential, group and sheltered care to children ages 11-18 who are neglected, in need of supervision and assistance, or delinquents placed in its care by the Juvenile Court. This organization has established programs for basic child care, education, family therapy, counseling, special education and recreation. Also, the Boys and Girls Homes of Montgomery County provides medical referral services, and accepts self-referrals to its program for runaway youth.

BOY SCOUTS OF AMERICA
(National Capital Area Council)

Since 1927 the Boy Scouts of America has reached boys in the National Capital Area through organized "Cub Packs" for boys aged 8-10, "Troops" for those in ages 11-16, and a "Co-Ed Explorer Carrer Interest Program" for youth aged 14-18. The National Capital Area Council of the Boy Scouts of America operates Goshen Scout

Camp in Goshen, Virginia, and trains local leaders to direct community scouting programs. The Council has special programs devoted to providing character development for youth in the metropolitan Washington, D.C. area.

LUTHERAN SOCIAL SERVICES OF THE NATIONAL CAPITAL AREA

Established in 1927, Lutheran Social Services of the National Capital Area provides adoption programs, foster care, emergency, juvenile delinquency and life-enrichment services, pastoral care, refugee resettlement and volunteer services for criminal offenders and ex-offenders. This group offers housing rehabilitation and counseling programs, a ministry to the aging and the homeless, and pretrial sponsorship of persons accused of crimes.

THE SALVATION ARMY
(National Capital Area)

Incorporated in 1899, the Salvation Army provides emergency shelter, financial assistance and supplementary aid, food and clothing, as well as counseling, referral services, and Christmas food and toys to needy persons in the National Capital area. Its Corps Community Centers provide family-life counseling, character-building and athletic programs for youth, senior citizen programs, day care facilities and camping. The organization also offers a center for alcoholic rehabilitation, and provides job counseling, prison ministries and disaster relief.

VISITING NURSES ASSOCIATION OF NORTHERN VIRGINIA

Since 1939, the Visiting Nurses Association of Northern Virginia has provided intermittent home health services, including skilled nursing and home health aide care to the residents of northern Virginia. It offers phsyical, occupational and speech therapy, and provides the services of pediatric nurse practitioners, medical social workers, enterostomial therapists and oncology nursing specialists. Visiting nurses also provide home I.V. therapy and home care for the terminally ill.

CENTER CITY COMMUNITY CORPORATION

The Center City Community Corporation assists low-income inner city residents by offering tutorial senior citizen and youth services. Incorporated in 1969, this organization provides computer literacy classes for all age groups, and operates a comprehensive housing counseling center aimed at assisting renters and homeowners in avoiding or overcoming housing problems.

THE UNITED BLACK FUND OF GREATER WASHINGTON, D.C.

The United Black Fund of Greater Washington, D.C. was created in 1969 to address the need for a balanced and unified fund-raising effort on behalf of community-based, non-profit organizations serving the social and economic needs of citizens in the greater Washington area. The Fund's member agencies, ranging from the Geriatric Day Care Center to the Howard University Sickle Cell Research Center, have as their primary purpose the meeting of community health and welfare needs.

No. 84-312

OCT 2 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DONALD J. DEVINE, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT,
Petitioner

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, under since-abolished eligibility procedures, charities which use litigation to serve health and welfare purposes could, consistent with the First Amendment, be excluded from the Combined Federal Campaign, for which health and welfare charities that use other methods were eligible.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION

STATEMENT

Respondents are seven charitable organizations concerned with the protection of the rights of minorities and women or with protection of the environment that were found on the record in the case to serve health and

welfare purposes.[1] This case involves whether respondents could constitutionally be barred, under since-abolished eligibility procedures, from participation in the Combined Federal Campaign, for which health and welfare charities generally were eligible, on the ground that they advance their goals in part by litigation.

The Combined Federal Campaign (CFC), access to which is at issue in this case, is the only means by which charities may solicit federal civilian and military personnel at their workplaces. Government-wide rules for charity solicitation of federal employees were first established in 1957 to provide national structure for the widespread, but unregulated, federal workplace solicitation which had taken place prior to that time. A succession of Executive Orders and pronouncements by the Civil Service Commission and its successor, the Office of Personnel Management (OPM), have since been promulgated governing this solicitation.

One provision of the rules for the CFC, as they existed in the 1960's and 1970's, limited participation to charities "providing direct services to persons in the fields of health and welfare services." U.S. Civil Service Commission, *Manual on Fund-Raising Within the Federal Services* § 5.21 (1977). Relying on this "direct services" requirement, OPM in 1980 rejected applications to the CFC by two of the respondents here, NAACP Legal Defense and Educational Fund

[1] The respondents are, in addition to the NAACP Legal Defense and Educational Fund, Inc., the Sierra Club Legal Defense Fund, the Puerto Rican Legal Defense and Education Fund, the Federally Employed Women Legal and Education Fund, the Indian Law Resource Center, the Lawyers' Committee for Civil Rights Under Law and the Natural Resources Defense Council.

and Puerto Rican Legal Defense and Education Fund. When those two organizations challenged the exclusion, the "direct services" standard was held unconstitutionally vague in *NAACP Legal Defense and Educational Fund* v. *Campbell,* 504 F. Supp. 1365 (D.D.C. 1981). As a result, the two organizations participated in the 1981 campaign.

Late in 1981, petitioner tried to persuade the President to issue an executive order excluding respondents and similar organizations from future CFCs on the ground of incompatibility with the Administration's budget priorities. I J.A. 70, 72. That proposal was, however, rejected and those two organizations continued in the 1982 campaign. The other respondents also applied and were admitted in 1982. The 1982 campaign, like the 1981 effort, set a fund-raising record. II J.A. 553.[2]

Petitioner renewed his effort to bar respondents and similar charities. On February 2, 1983, he forwarded to the White House another set of proposed Executive Order provisions intended for that purpose. I J.A. 106-113. In addition to repeating and elaborating on the requirement that CFC participants provide "direct health and welfare services," the proposed order flatly declared, "Agencies that seek to influence . . . the determination of public policy through political activity or advocacy, lobbying or litigation on behalf of parties other than themselves shall not be eligible" for the CFC. Executive Order 12404, embodying these provi-

[2] Final results for the 1982 campaign exceeded the preliminary figures available to the District Court. The 1982 campaign produced $100,737,667, a 6.42% increase over 1981. CFC Memorandum 83-15, 16 (Nov. 28, 1983).

sions was issued on February 10, 1983. 48 Fed. Reg. 6685 (1983).

Respondents' challenge to the validity of the exclusionary provisions of the new Executive Order was sustained by the District Court. 567 F. Supp. 401 (D.D.C. 1983), *reprinted* at Ptn. App. 84a. The court held that under the standards of *Perry Education Assn.* v. *Perry Local Educator's Assn.*, 460 U.S. 37 (1983), the CFC was a limited public forum established by the federal government for the purpose of regulating workplace solicitations of charitable gifts, that respondents fell within the "limits of that forum as it historically existed" and that the exclusion of respondents on the basis that they sought to achieve their charitable objectives by litigation was a content-based restriction. The Court concluded that the exclusion failed to meet the requirement that content-based restrictions on access to a limited public forum serve a compelling governmental interest. The argument that such groups could be excluded because they were controversial was rejected not only as inadequate as a compelling state interest, but also as "impermissible." While the Court recognized as legitimate the government's interest in avoiding the appearance of endorsing particular groups, it nevertheless held that that purpose could be served by a disclaimer in the solicitation materials without excluding any group. Accordingly, it enjoined the use of the exclusionary provisions of the Executive Order to bar respondent from seeking "designated" contributions in the 1983 CFC.[3] Respond-

[3] Federal employees may either "designate" their gifts to the CFC for a particular recipient, or give to the CFC generally. These "undesignated" funds—roughly a third of the total in 1983

ents' claim for eligibility to share in the distribution of undesignated funds (given the CFC as a whole and not to a particular charity) was dismissed and has not been appealed.

As a result of that order, respondents applied to the 1983 CFC and were granted national eligibility,[4] along with 150 other charities.[5] The 1983 campaign, like the earlier campaigns in which respondents participated, set a new record—$110.4 million—for total funds raised.[6]

While the 1983 CFC was being conducted subject to the District Court order, petitioner appealed that order. The United States Court of Appeals for the District of Columbia Circuit agreed that respondents could not constitutionally be excluded from the CFC

—are distributed at the discretion of the "Principal Combined Fund Organization" (PCFO), usually the United Way.

[4] The order did not guarantee participation in the CFC. Respondents remained subject to the other requirements for national CFC eligibility, e.g., breadth of public support, integrity of fundraising practices, and soundness of financial accounting standards. Moreover, securing "national eligibility" was only the first step to participation; once so eligible, respondents, like other groups, had to apply to each local campaign and demonstrate sufficient "local presence" to participate in the local campaign. 5 C.F.R. § 950.405 (a); 407(d), 48 Fed. Reg. 34920-22 (1983).

[5] In addition to respondents, 22 other groups were identified by petitioner as certified for national eligibility only because of the District Court order. CFC Memorandum 83-12 (Sept. 16, 1983).

[6] *Washington Post*, Sept. 20, 1984, p. A17.

on the basis of their litigation activities.' 727 F.2d 1247 (D.C. Cir. 1984), *reprinted at* Ptn. App. 1a. The Court of Appeals concluded that the CFC was not, as petitioner had claimed on appeal, intended by the federal government as a subsidy to participating charities, but as a means of regulating their solicitations of contributions from federal workers. Ptn. App. 14a-15a. It found it unnecessary, however, to decide whether the CFC constituted a "limited public forum." Rather, it concluded that, wherever the CFC fell in *Perry*'s tripartite classification of government-controlled channels of communications, exclusion of respondents on the basis of their litigation activities did not meet *Perry*'s requirement that some speakers could be denied access granted others only on the basis of distinctions "reasonable in light of the purpose which the forum at issue serves." 460 U.S. at 49. On the basis of the record in the case, the Court of Appeals found the petitioner's claimed interests in excluding respondents deficient.[8]

Shortly before seeking review in this Court, petitioner issued in final form new regulations abolishing the national eligibility process at issue in the case and permitting gifts through the CFC to any tax-exempt

[7] Although the exclusionary provisions of the Executive Order applied to "political activity or advocacy, [and] lobbying" as well as litigation, litigation alone would be sufficient to bar an otherwise qualified health and welfare charity. 5 C.F.R. § 950.101(a)(1)(v)(C), 48 Fed. Reg. 34915 (1983). It is on the basis of the respondents' litigation efforts, not the other types of activities (which form a very minor part of their programs and which are sharply restricted by the tax laws for all charities), that they would have been barred from participation.

[8] The specific rationales advanced, and the reasons for the Court of Appeals rejecting them, are discussed below, pp. 16-19.

charity. 49 Fed. Reg. 32735 (Aug. 16, 1984). Although stated to have been issued in response to the court decision here sought to be reviewed, they make changes that go far beyond subjects covered in that decision (e.g., by abolishing the ban on individual charity advertising to encourage CFC gifts), they were adopted after extensive consultation with the United Way and other charities, and they reflect congressional guidelines concerning the future management of the campaign.[9]

REASONS FOR DENYING THE WRIT

Summary

The decision below depends on a purely factual finding—that respondents provide and support health and welfare services. It simply holds that they cannot constitutionally be excluded from the CFC, for which other health and welfare charities are eligible, merely because they provide their health and welfare benefits partly by litigation. It does not, contrary to suggestions in the Petition, hold that all tax-exempt charities must be admitted to the CFC, much less purport to change the standards by which to measure the propriety of limiting speakers' access to government property generally. In any case, the issue litigated below now is of no practical significance because petitioner, since the Court of Appeals decision, has issued new regulations abolishing the national eligibility process with which this case is concerned and making other fundamental changes in the CFC.

[9] Although the preamble to the new regulations states that they are subject to modification at the direction of a court, Congress or the President, petitioner has not represented to this Court, or otherwise, that he will reinstitute a national eligibility process if this Court reverses the decision below. See Ptn. 7 n.7.

Discussion

1. *The decision below depends on a factual finding that respondents are health and welfare charities.* The Petition barely mentions the critical factual basis of both the District Court's and the Court of Appeals' holdings, namely their judgments, based on the record, that respondents are in fact health and welfare charities that differ from so-called "traditional" health and welfare charities only because they use litigation as a means to achieve their health and welfare objectives. The factual similarity of objectives and benefits between respondents and eligible charities lies at the heart of the decision below, for it makes clear that the issue is not (as petitioner suggests) whether the CFC must be opened to all charities, but whether certain charities whose objectives are identical to charities *included* in the CFC can be *excluded* because they use litigation as a method of achieving those objectives.

Contrary to the Petition's implication (Ptn. 10-11, 24) that the Court of Appeals found respondents to be "similarly situated" to eligible groups solely because they share a common basis for tax exemption in 26 U.S.C. § 501(c)(3), the court stressed that the respondents shared common health and welfare purposes and benefits with the preferred groups.[10] It summed up its

[10] In this connection, the Court of Appeals pointed to the inclusion of the U.S. Olympic Committee and a number of conservation groups. Ptn. App. 22a. Petitioner suggests (Ptn. 18 n.17) that, if he had realized the significance the Court of Appeals would attach to the point, he could have shown that the Olympic Committee serves health and welfare purposes. Apart from the procedural belatedness of this proffer (also made in his rejected petition for reconsideration by the Court of Appeals), it misses the point. The

"similar situation" analysis by saying, "In short, both in terms of their longstanding treatment under the tax code and the parameters of the CFC as it has traditionally been understood, the status of the [respondents] and the included charities is virtually identical." Ptn. App. 22a."

That finding was based on the record in the District Court and is not an appropriate matter for review in this Court. All respondents have submitted affidavits

Court of Appeals based its analysis not on a conclusion that other participating groups did *not* provide health and welfare benefits, but on its conclusion that respondents *did* provide such benefits. Petitioner has no basis to claim surprise on this issue. Respondents had contended that their work served health and welfare purposes from the initial stage of the action and had supported it by affidavits. The petitioner had not disputed it, contending only that respondents' qualification under the Executive Order—which included the litigation provisions—was uncertain. II J.A. 463.

[11] The Court of Appeals' reference to the tax code as a source of guidance on permissible advocacy activity by charities was appropriate. As this Court has recently observed in *Regan* v. *Taxation With Representation*, —— U.S. ——, 103 S.Ct. 1997 (1983), the provisions of section 501(c)(3) and 501(h) reflect a congressional judgment of how much political activity is consistent with tax-exempt charity status. Treasury Regulations recognize "defense of civil or human rights protected by law" as a legitimate charitable activity. 26 C.F.R. § 1.501(c)(3)-1(d)(2). The Internal Revenue Service has recognized the charitable status of so-called public interest law firms since shortly after they were first established. Rev. Proc. 71-39, 1971-2 C.B. 575. This statutory and administrative recognition of the legitimacy of the methods used by respondents buttresses the conclusion that, given their health and welfare objectives, they cannot constitutionally be disadvantaged in access to government-controlled channels of communication simply because of those methods.

showing how their litigation and other activities served health and welfare purposes.[12] The petitioner in opposing respondents' motion for summary judgment claimed only that it was not clear whether respondents met the requirements of the Executive Order;[13] he did not dispute even in conclusory terms (nor does he do so now) that the respondents' work produces health and welfare benefits.[14]

The factual similarity of respondents to health and welfare charities that have traditionally been in the CFC and were eligible under the Executive Order forms the foundation both of the correctness of the decision below and of its limited general significance. Under *Perry* "the touchstone for evaluating . . . distinctions [in access to nonpublic forums] is whether they are reasonable in light of the purpose which the

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[12] The Petition's statement that "the litigation efforts of *one* respondent had resulted in benefits to needy people" (Ptn. 11) (emphasis added) misreads both the Court of Appeals opinion and the record. The Court of Appeals expressly noted that not only the NAACP Legal Defense and Educational Fund, but the other groups as well had submitted affidavits showing their services to the needy and to the protection of public health. Ptn. App. 25a n.13.

[13] II J.A. 463. Prior to promulgation of regulations, it was not clear how much litigation and other "advocacy" activity would result in exclusion. The regulations, proposed a few days before the District Court decision and adopted in final form on August 1, 1983, provide that if 15% of the budget of a health and welfare group was spent for litigation, lobbying, or attempting to influence executive branch action, the group could be excluded. 5 C.F.R. § 950.101(a)(2), 48 Fed. Reg. 34915 (1983).

[14] The opponent of a motion for summary judgment has an obligation to identify material issues in dispute and advance specific facts supporting his contention. Fed. R. Civ. P. 56(e).

forum at issue serves." 460 U.S. at 49. The Court of Appeals found this case factually different from *Perry* in terms of the nature of the forum and the excluded speakers' relation to it. In *Perry*, the purpose of the forum was to aid internal management of the schools and, from that point of view, the status of the excluded speaker—an unrecognized union—was fundamentally different from that of the recognized bargaining agent that used the school mail facilities at issue. 460 U.S. at 47, 49. Here, by contrast, the Court of Appeals concluded that the record showed that the purpose of the CFC was to allow certain charities to solicit funds and that respondents, in addition to being recognized as charities for tax purposes, provided and supported direct health and welfare services, so that "the status of the [respondents] and the included charities is virtually identical." Ptn. App. 22a. Since respondents are, and were found on the basis of the record to be, health and welfare charities, their status *vis-a-vis* the CFC and its purpose is identical to the groups granted eligibility by the Executive Order.

The Court of Appeals applied the settled law of this Court when it observed that in situations where some are allowed to speak, highly similar speakers may not be excluded, even from a nonpublic forum,[15] unless

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[15] While the Court of Appeals did not reach the question, it is clear under *Perry* that the CFC (viewed either as a forum in itself or as a limited use of the federal workplace for communication) qualifies as a "limited public forum," at least for health and welfare charities. In *Perry*, the school mail facilities were open to certain charities of interest to students, like the Cub Scouts and YMCA. The Court noted that the mail facilities might be a "limited public forum" for "other entities of similar character," i.e., other

the exclusion reasonably serves a legitimate government interest in preserving the purpose of the forum. In *Perry*, for example, this Court noted "[W]hen speakers and subjects are similarly situated, the State may not pick and choose. 460 U.S. at 55.

2. *The practical effects of the decision are sharply limited.*

a. The Petition's suggestion (Ptn. 24) that the decision implies that the federal government must "assume the role of publicity and collection agent for all tax exempt organizations," simply ignores what the Court of Appeals held. Its decision that respondents were "similarly situated" to other health and welfare charities from the point of view of the purpose of the CFC rested not, as the Petition implies, only on their

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organizations of interest to students. 460 U.S. at 48. The CFC is exactly analogous. Since the federal government has created in the CFC a limited public forum for health and welfare charities, there must be not merely a reasonable, but a compelling, basis for content-based restrictions on access.

Petitioner half-heartedly suggests (Ptn. p. 14-15 n. 14) that he has "some doubt" whether the CFC is a forum at all. His contention that the CFC is somehow a governmental subsidy and not a forum for charities to communicate flies in the face of the fact that the CFC has been repeatedly described by government officials as a method of charitable solicitation—an activity protected by the First Amendment, *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980)—and that it involves circulation to millions of federal employees of charity-written descriptions of their activities. The contention that the CFC is a subsidy was extensively argued, and squarely rejected, below (Ptn. App. 14a-17a) and appears not to be revived in the Petition as a basis on which review is sought in this Court.

tax status, but on the health and welfare benefits respondents provide. Only charities able to make such a showing as to the health and welfare nature of their programs come within the decision, so the image of a CFC inundated by 300,000 participants is wildly exaggerated.[16]

b. The Petition repeats (Ptn. 24) the same speculations of disruption of the CFC that the Court of Appeals rejected and declares that "implementation of the decision below will result in a significant decrease in the success of the Campaign." That assertion is not only absolutely unsupported in the record; it is contradicted by the actual experience of steadily increasing financial success of the last three campaigns (see p. 5 above).

c. Contrary to petitioner's assertion (Ptn. 16, 25), the Court of Appeals did not apply a more demanding standard than required in *Perry*. *Perry*'s dual requirement is that distinctions in access to a nonpublic forum be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." 460 U.S. at 46. The Court of Appeals concluded on the record that these tests were not satisfied here.

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[16] Even admission of *all* litigating groups would not "inundate" the CFC. While the Petition (Ptn. 24 n.25) is correct that the IRS lists some 300,000 section 501(c)(3) charities, its most recent survey of charities (based on analysis of 1975 returns) reported that there were only 40 groups in the category of "litigation" other than legal aid. By contrast, there were over 30,000 groups that come within the "traditional" health and welfare categories (health services, youth, housing, inner city, legal aid, other individual aid, and United Fund). *IRS Statistics of Income Bulletin* No. 2, Table 2, 11-16 (Fall 1981).

Both respondents and charities not using litigation were, it found, health and welfare charities, so that the clear difference in status of speakers *vis-a-vis* the purpose of the forum that existed in *Perry* was not present. It therefore examined "with some care" the claim that, despite the similarities between respondents and other health and welfare charities, preference for the latter was still reasonable. It took pains to emphasize that "the inquiry we have delineated is demanded by the similarities between the included and excluded charities in this case" and would not be appropriate where such similarity were lacking. Ptn. App. 24a. Thus, the conceptual basis of the Court of Appeals' analysis as well as its particular results were entirely consistent with *Perry*.

3. *Petitioner has since abolished the national eligibility process of which the exclusionary rules invalidated below were a part.* Since the Court of Appeals' decision, petitioner has made fundamental changes in the regulations governing the CFC, which make any further review of that decision of largely abstract interest. The new CFC regulations, proposed in April, 49 Fed. Reg. 14752 (Apr. 13, 1984) and adopted in final form in August, 5 C.F.R. Part 950, 49 Fed. Reg. 32735 (Aug. 16, 1984), not only drop the "advocacy" restrictions invalidated below, they entirely abolish the national eligibility process of which those restrictions were a part. 49 Fed. Reg. 14752 (Supplementary Information) (national eligibility process "eliminated"). Employees may now give to any tax-exempt charity through the CFC. 5 C.F.R. § 950.521(e)(1)(v), 49 Fed. Reg. 32750 (1984). The new regulations leave to local campaigns and, to some degree, groups of charities, the task of listing possible donees. 5 C.F.R. § 950.-

521(e)(2) and (3). Henceforth, charities that apply to local campaigns will be listed by name only, or, if the local CFC chooses not to have such a list, the CFC materials will include a report prepared by the PCFO describing all groups that received gifts the previous year.

The changes go far beyond anything addressed, much less required, by the decision at issue here.[17] OPM review of participants' financial integrity, fund-raising practices, breadth of support, and public accountability—none of which was in any way questioned in this case—are all abolished. Moreover, the new regulations, in exchange for ending the prior practice of having each local CFC circulate solicitation materials that include a brief description of each participant, lift the ban on charities attempting to solicit CFC gifts through the general media and by direct mail and affirmatively encourage such solicitation. 5 C.F.R. § 950.521(b).

The new regulations produce nothing less than a revolution in the CFC. While petitioner stated that he issued the new regulations subject to modification if "a court, the Congress or the President" so directs, 49 Fed. Reg. 32735 (1984) (Supplementary Information), he has not represented to this Court or otherwise that he would restore the national eligibility

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[17] Last year, the CFC was conducted within the framework of the regulations issued on August 1, 1983. Petitioner, in ruling on national eligibility, simply identified those few groups which he judged would have been excluded had he been free to apply the Executive Order 12404 exclusionary rules. The campaign was an unprecedented success, so drastic revision of the workable interim system used last year pending further judicial review was not necessary.

system under any circumstances. Further, the new regulations' treatment of the eligibility issue—which is the part of the CFC at issue here—reflects not merely petitioner's proposals, but also a congressional directive. S. Rep. No. 98-562, 98th Cong., 2d Sess. 70 (Jul. 17, 1984) (guidelines for soliciting materials and for permitting gifts to any section 501(c)(3) public charity).

In light of the drastic changes in the CFC regulations, the Court of Appeals decision is now of no continuing practical significance. After the abolition of any national eligibility process, the issue of what limits could constitutionally be placed on national eligibility no longer arises, and the possibility that petitioner might choose to reinstitute the process he has just eliminated is insufficient to make this other than an abstract issue. *Princeton University* v. *Schmid,* 455 U.S. 100 (1982) *(per curiam).*

4. *The Court of Appeals conformed fully to the standards set by this Court when it rejected as unreasonable claims that excluding respondents served the purpose of the forum.*

a. The principal purpose claimed for the exclusion of litigation groups was that they were so "controversial" that their inclusion would be disruptive of government work or jeopardize the success of the CFC. This Court has long recognized the dangers of the "heckler's veto"—or its less colorful cousin, "controversiality"—as a valid basis for restricting speech. *Terminiello* v. *Chicago,* 337 U.S. 1 (1949); *Police Dept.* v. *Mosley,* 408 U.S. 92, 96 (1972). *Cf. Bolger* v. *Youngs Drug Products,* —— U.S. ——, 103 S.Ct. 2875, 2883 (1983) ("offensiveness"). Moreover, this Court has recognized that use of judicial processes to enforce legal

rights is itself an important First Amendment freedom. *NAACP* v. *Button,* 371 U.S. 415 (1963).

The Court of Appeals was only reflecting these concerns when it expressed uneasiness at the idea that "controversiality" could be a reasonable basis for exclusion.[18] However, it declined to adopt the absolute District Court position that it is *per se* an impermissible ground. Instead, it examined the record and concluded that there was no evidence of workplace disruption, additional costs to the government for its part in the CFC, or of interference with the success of the CFC. In the circumstances of the case and in light of the clear evidence of lack of disruption, it was appropriate to expect the government to show some real—and not merely speculative—chance of danger from objectors before accepting the alleged "controversiality" of a speaker as a reasonable basis for exclusion. *Police Dept.* v. *Mosley,* 408 U.S. at 101; *Tinker* v. *Des Moines School District,* 393 U.S. 503, 508 (1969).[19]

b. Petitioner also advanced the related claim that permitting groups like respondents to solicit through the CFC would create an impression of government endorsement of the "advocacy" participants or of

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[18] Uneasiness was especially appropriate here, given petitioner's repeated efforts to exclude respondents on a shifting variety of grounds. These efforts were outlined by the Court of Appeals at Ptn. App. 7a-11a.

[19] Petitioner suggests (Ptn. 21) that he met the burden of showing that objections to respondents' participation in the CFC posed a danger to the purpose of the CFC merely by showing that there were in fact objectors, without any showing of their effect. That would amount to simply enshrining the heckler's veto, at least where the government officials hearing the objections were sympathetic to their content.

"politicization" of the CFC. This Court has recently rejected a claim that exclusion of a class of speaker from a forum can be justified solely on the ground of avoiding apparent endorsement. *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1982). The Court of Appeals noted that the lack of evidence of impact of "controversial" groups on the CFC or the federal workplace refuted this contention as well.[20] In any case, it found the exclusion could not be justified by a need to avoid apparent government endorsement of "political advocacy," for the mere fact that the respondents' work had a particularized focus on minorities or pollution and used litigation to advance their ends could not sustain such a classification, since both are hallmarks of many other charities that were eligible, notably legal aid societies. Ptn. App. 21-27a.[21]

c. Finally,[22] petitioner argues that the Court of Appeals wrongly rejected as irrelevant his contention

[20] Since under the District Court injunction, respondents were entitled only to solicit designated funds and had no right to any share of "undesignated" funds given the CFC generally, the Court of Appeals noted that there was no question of respondents' receiving money indirectly from givers who objected to them. Ptn. App. 33a.

[21] Although the Executive Order appeared to make any legal representation of others a bar to participation, the OPM General Counsel had declared at the time the Order was issued that legal aid societies would not be barred if they did not choose cases on the basis of the nature of the claim at issue. II J.A. 433, 461. This, as well as the inclusion of many organizations with specific concerns, such as agencies with a focus on particular diseases, raise serious equal protection questions about the exclusionary provisions of Executive Order 12404.

[22] The Court of Appeals also addressed two other claimed justifications not, apparently, pressed here. First, it found that since

that the existence of alternative forums, such as soliciting federal employees at home, made it reasonable to exclude them from the CFC. What the Court of Appeals held was that in the absence of some reasonable basis for exclusion related to the purpose of the CFC, the existence of alternative means of communications, even if equivalent, could not justify an otherwise unreasonable "picking and choosing" among charities that were allowed to solicit through the CFC.[23]

the respondents provided health and welfare benefits to the needy, they could not reasonably be excluded on the basis of a government policy to insure that CFC gifts went to groups serving the needy. Ptn. App. 24a-25a. Second, it held that a desire to keep the numbers of charities in the CFC within manageable numbers could not justify a content-based preference, especially in light of petitioner's acknowledgement that the numerical impact of the exclusion would be small. Ptn. App. 35a-36a.

[23] The Petition's citations (Ptn. 23) to instances when this Court has said that the availability of alternatives may be relevant to a determination of the reasonableness of an exclusion misses the point. In the cases cited by the petitioner, there were sound reasons, independent of alternatives, for the distinctions drawn. *See, e.g., Perry*, 460 U.S. at 53 (reasonableness of limitation "also supported" by existence of substantial alternative channels). The Court of Appeals held only that the mere existence of alternatives could not alone make reasonable an exclusion based on distinctions for which there was "no reasonable explanation." Ptn. App. 36a. The Petition criticizes the Court of Appeals for failure to cite authority for its observation that the existence of other channels of communication would not in itself excuse the lack of a reasonable basis for selectively excluding respondents. Statements of this Court in support of that—seemingly hard to dispute—proposition include *Schneider* v. *State*, 308 U.S. 147, 163 (1939), and *United States* v. *Grace*, —— U.S. ——, 103 S.Ct. 1702, 1709 (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 84-312

In the Supreme Court of the United States

OCTOBER TERM, 1984

DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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We showed in the petition that the court of appeals' analysis of the restrictions on participation in the Combined Federal Campaign set forth by Exec. Order No. 12,404, 3 C.F.R. 151, represents a significant departure from the standard prescribed by *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37 (1983), and other nonpublic forum cases of this Court. We also explained that the decision below creates serious practical problems for administration of the Campaign and may cause difficulties for federal officials in other contexts as well.

In their response to the petition, respondents attempt to minimize the significance of the court of appeals' decision by portraying it as a routine application of this Court's First Amendment precedents that will have limited practical

effect. That characterization is incorrect; it is belied by events that have occurred since respondents first challenged the Campaign's eligibility criteria in 1980 and by the fact that the court of appeals denied rehearing en banc of the decision below by an equally divided vote. Since many of respondents' contentions were anticipated and answered in the petition, only a short reply is required.

1. Respondents contend (Br. in Opp. 8-12) that the decision below rests on a factual finding by the court of appeals that they provide health and welfare services and are therefore indistinguishable from organizations that traditionally were included in the Campaign. But there unquestionably are differences between "cause"-oriented legal advocacy groups, like respondents, and the traditional health and welfare charities, like the American Red Cross, to which Campaign participation originally was limited. As amici United Black Fund of America, et al., point out (Br. 4-5, 9), advocacy groups may have entirely laudable purposes, but they are devoted to objectives that are "fundamentally different" from the provision of direct health and welfare services to persons in need. Respondents themselves do not suggest that they would have been eligible to participate in the Campaign as it was traditionally defined. The court of appeals' refusal to acknowledge the significance of the distinctions federal officials have perceived between groups like respondents, on the one hand, and traditional health and welfare charities, on the other, is simply a manifestation of its departure from the sort of deference this Court in the past has accorded to governmental judgments concerning access to nonpublic forums.

2. Respondents suggest (Br. in Opp. 12-13) that the decision below mandates admission to the Campaign of only a limited number of groups, not the full range of tax-exempt organizations. Respondents acknowledge (*id.* at 9), however, that the court of appeals relied in part on their

eligibility for tax exemption under 26 U.S.C. 501(c)(3) in concluding that respondents' status was identical to that of traditional health and welfare charities. Moreover, they do not dispute the court of appeals' apparent conclusion that any reference to direct health and welfare services to the needy must be assigned a definition that is considerably broader than that prescribed by the President in Exec. Order No. 12,404 and used by the five previous Administrations. In view of the court's expansive approach to classification of organizations, it seems clear that many tax-exempt groups could qualify for participation in the Campaign under the decision below.

3. Respondents attempt to minimize the significance of dissatisfaction among federal employees that has resulted from the recent inclusion of advocacy groups in the Campaign in response to court orders by noting that the amount raised by the Campaign has increased each year. See Br. in Opp. 3, 5, 13. But, as Judge Starr pointed out (Pet. App. 64a), the record indicates that those increases were achieved only through extraordinary and time-consuming efforts on the part of Campaign volunteers. Perhaps more important, the number of contributors to the Campaign has decreased in recent years — a development that obviously threatens the long-term success of the Campaign. See *id.* at 65a; C.A. App. 466; United Black Fund Am. Br. 10.[1] As amici United Black Fund of America, et al., observe (Br. 3), "[t]he strength of the Campaign depends on the good will of employees and their willingness to donate to the participant organizations." As we explained in the petition (at 20-21),

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[1]The brief of amici United Black Fund of America, et al., appears to contain (at 10) an incorrect citation to a *Washington Post* article. That article (found at *Washington Post*, Sept. 20, 1984, at A17, col. 3) correctly states that the percentage of federal employees participating in the Campaign has dropped from 70.6 in 1978 to about 54.5 in 1983.

past experience supports the President's judgment that inclusion of advocacy groups in the Campaign is likely to erode that good will and to diminish significantly the success of the Campaign.

4. Respondents contend finally (Br. in Opp. 14-16) that the decision below is of no continuing importance because the Office of Personnel Management has issued new regulations designed to govern operation of the Campaign being conducted during the fall of 1984. See 49 Fed. Reg. 32735 (1984) (to be codified at 5 C.F.R. Pt. 950). Respondents point out that the new regulations make substantial modifications in the structure of the Campaign, including, inter alia, elimination of national eligibility criteria and admission of all tax-exempt organizations to Campaign participation.

In fact, the magnitude of the changes made by the new regulations constitutes evidence of the practical impact of the decision below. As we noted in the petition (at 7 n.7), the new regulations represent OPM's effort to comply with the decision below pending further review. See 49 Fed. Reg. 32735 (1984). While OPM would prefer to administer the Campaign as it has in the past, its judgment is that successful accommodation of the changes mandated by the decision below requires fundamental restructuring of certain aspects of the Campaign. See *ibid.*

The preamble to the new regulations states that they are issued "without prejudice to [OPM's] right or duty further to modify the rules in the event of a supervening direction from a court, the Congress, or the President." 49 Fed. Reg. 32735 (1984). If this Court should grant the petition and uphold the traditional limitations on Campaign participation, as prescribed in Exec. Order No. 12,404, it is petitioner's intention to rescind the new regulations and to

conform the operation of the Campaign to the requirements set out in the executive order. See *Mancusi* v. *Stubbs*, 408 U.S. 204, 205-207 (1972).

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

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JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

DOCKET NO. 83-0928

JOYCE HENS GREEN, J.

TITLE: NAACP LEGAL DEF. & ED. FUND, ETL V DEVINE

CAUSE: 5 USC 702; REVIEW OF AGENCY ACTION

 # 1 PLA
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

 # 2 PLA
PUERTO RICAN LEGAL DEFENSE AND EDUC. FUND, INC.

 # 3 PLA
FEDERALLY EMPLOYED WOMEN LEGAL AND EDUC. FUND, INC.

 # 4 PLA
INDIAN LAW RESOURCE CENTER

 # 5 PLA
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

 # 6 PLA
SIERRA CLUB LEGAL DEFENSE FUND, INC.

 # 7 PLA
NATURAL RESOURCES DEFENSE COUNCIL, INC.

8 DFT
DONALD J. DEVINE HON.
DIRECTOR, U.S. O.P.M

DATE	NR.	PROCEEDINGS
1983		
Mar 30	1	COMPLAINT, appearance; Exhibits; affidavits.
Mar 30	2	MOTION of pltffs. for preliminary injunction; memorandum.
Mar 30	3	MOTION of pltffs. for summary judgment; statement of facts; P&A's.
Mar 30		SUMMONS (3) issued.
Mar 31	4	ORDER directing that within 7 days, counsel for pltfs. shall report to the Court whether this case, in their view, is related to CA 80-1888 NAACP Legal Defense Fund vs. Campbell, CA 80-2070 Puerto Rico Legal Defense and Education Fund vs. Campbell, CA 81-2999 NAACP Legal Defense Fund vs. Devine, or any other action that has been before this or any other US Dist. Court, within the meaning of Rule 3-4 of the Rules of the USDC for D.C. (N) GREEN, JOYCE J.
Apr 6	5	AFFIDAVIT of Service upon Donald J. Devine on March 30, 1983 and upon the U.S. Atty. on March 31, 1983.
Apr 6	6	REPORT by Pltffs. to the Court on relationship of this matter to other cases before this Court; attachment.
Apr 8	7	MOTION by defts. to strike pltffs' motion for summary judgment and memo of P&A's in support thereof.

Apr 12	8	CONSENT MOTION by def for enlargement of time and Memo of P&A's to respond to pltf's. motion for preliminary injunction.
Apr 12	9	MOTION by deft. to dismiss; P&A's; Attachments A through D.
Apr 14	10	ORDER filed 4-13-83 granting motion of deft for extension of time to file opposition to pltfs' motion for a preliminary injunction on or before 4-12-83. (signed 4-12-83 (N) GREEN, JOYCE, J.
Apr 14	11	RESPONSE by Pltffs. to deft's. motion to strike.
Apr 19	12	AFFIDAVIT of Service by certified mail upon Atty. Gen. on 3-30-83; Attachment.
Apr 26	13	ORDER filed 4-22-83 deeming that pltfs' motion for summary judgment be filed as of 4-19-83, and that the time in which deft. has to respond thereto shall commence running on that date. JOYCE GREEN, J.
Apr 26	14	MEMORANDUM by Pltffs. in opposition to deft's. motion to dismiss; Affidavit of Emanuel Owens; Exhibits N through S.
May 2	15	MOTION by deft. for enlargement of time to respond to motion for summary judgment; P&A's.
May 10	16	ORDER filed 5-6-83 denying motion of deft to dismiss; denying motion of pltfs for a preliminary injunction; and granting motion of deft for enlargement of time within ten (10) days to respond to pltfs' motion for summary judgment. (N) (signed 5-5-83) JOYCE HENS GREEN, J.
May 16	17	MOTION by defts. for enlargement of time to respond to pltffs' motion for summary judgment; P&A's.

May 19	18	ORDER filed 5-18-83 granting motion of deft. for enlargement of time to and including 5-18-83 to respond to pltfs' motion for summary judgment. (N) (signed 5-17-83) JOYCE GREEN, J.
May 18	19	MOTION by deft. for enlargement of time to respond to pltffs' motion for summary judgment; P&A's.
May 20	20	STATEMENT by Pltffs. of points and authorities in opposition to deft's. motion for further enlargement of time to file response to pltff's. motion for summary judgment.
May 20	21	MOTION by deft. to exceed page limitation: EXHIBIT (Memo of P&A's in opposition to S/J)
May 24	22	ORDER filed May 23, 1983, granting motion of deft. to exceed page limitation. (N) JOYCE GREEN,
May 24	23	ORDER filed May 20, 1983, granting motion of deft. for enlargement of time to on or before 5-19-83 to respond to pltf's motion for summary judgment. (N) JOYCE GREEN, J.
May 24	24	MEMORANDUM by defts. of points and authorities in opposition to pltff's. motion for summary judgment; Statement of genuine issues; Attachment A.
May 26	25	ORDER filed May 25, 1983 granting nunc pro tunc, the motion of deft. for enlargement of time to file opposition to pltf's. motion for summary judgment and said opposition shall be accepted by the Clerk of the Court. (signed: 5-24-83) (N) JOYCE GREEN, J.
May 26	26	ERRATA by deft. to deft's. memo of P&A's in opposition to pltffs' motion for summary judgment; Attachment.

May 27	27	REPLY by Pltffs. in further support of pltffs' motion for summary judgment; Table of Contents; Table of Authorities; Affidavit of William L. Robinson; Affidavit of Sharon Miles and Affidavit of Anne F. Sweazey w/Attachments.
Jun 10	28	ORDER filed June 9, 1983 setting for oral argument on motion of pltf. for summary judgment on 6-23-83 at 10:00 A.M., each side will be allowed 45 minutes for argument. (signed: 6-8-83) (N) JOYCE GREEN, J.
Jun 23		STATUS CALL; parties to simultaneously file and hand deliver supplemental briefs as regulations received 6/23/83, by no later than 4:00 p.m. on 6/28/83, with any responses by no later than 4:00 p.m. on 6/30/83; resetting arguments on motion of pltf. for summary judgment for 7/6/83 at 1:30 p.m. (45 minutes per side) (Rep. D. MacQuown) JOYCE GREEN, J.
Jun 23	29	NOTICE of filing by deft.; attachment.
Jun 24	30	ANSWER by deft. to complaint.
Jun 24		CALENDARED CD/N
Jun 28	31	SUPPLEMENTAL MEMORANDUM by Pltffs. in support of their motion for summary judgment; Table of Contents; Appendix A & B.
Jun 28	32	SUPPLEMENTAL MEMORANDUM by deft. in opposition to pltffs' motion for summary judgment; Exhibit A & B.
Jun 30	33	REPLY by Pltffs. to deft's. supplemental memorandum; Appendix A & B.
Jun 30	34	REPLY by Deft. to pltffs' supplemental memorandum; Exhibit A & B.
Jul 6		MOTION by pltfs. for summary judgment argued and taken under advisement. (Rep: Doug MacQuown) JOYCE GREEN, J.
Jul 18	35	MEMORANDUM OPINION filed July 15, 1983. (N) JOYCE GREEN, J.

Jul 18 36 ORDER filed July 15, 1983, granting in part and denying in part, motion of pltfs. for summary judgment, as explained in the Memorandum Opinion; permanently enjoining deft. from excluding pltfs. from participation in the Combined Federal Campaign with respect to the solicitation of "Designated contributions"; dismissing without prejudice to the extent that pltfs' complaint concerns their right to receive "undesignated contributions" and denying request of pltfs. for preliminary injunction. (N) JOYCE GREEN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0928

JOYCE HENS GREEN, J.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
10 COLUMBUS CIRCLE, SUITE 2030,
NEW YORK, N.Y. 10019
(212) 586-8397;
PUERTO RICAN LEGAL DEFENSE AND
EDUCATION FUND, INC.
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NEW YORK, N.Y. 10157
(212) 532-8479
FEDERALLY EMPLOYED WOMEN LEGAL AND
EDUCATION FUND, INC.
1426 H STREET, N.W., SUITE 800,
WASHINGTON, D.C. 20005
(202) 638-9579;
INDIAN LAW RESOURCE CENTER,
601 E STREET, S.E., WASHINGTON, D.C. 20003
(202) 547-2800;
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW,
733 15TH STREET, N.W., SUITE 520,
WASHINGTON, D.C. 20005
(202) 628-6700;
SIERRA CLUB LEGAL DEFENSE FUND, INC.,
1424 K STREET, N.W.,
WASHINGTON, D.C. 20005
(202) 347-1770; AND
NATURAL RESOURCES DEFENSE COUNCIL, INC.,
122 E. 42ND STREET, NEW YORK, N.Y. 10168
(212) 949-0049,
PLAINTIFFS,

v.

HON. DONALD J. DEVINE, DIRECTOR,
UNITED STATES OFFICE OF PERSONNEL MANAGEMENT,
1900 E STREET, N.W.,
WASHINGTON, D.C. 20415,
DEFENDANT.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I.
NATURE OF THE CASE

1. This is a complaint for declaratory and injunctive relief seeking to enforce the rights of the plaintiffs, corporations organized under the laws of New York or the District of Columbia and authorized to do business in the District of Columbia, under the First and Fifth Amendments to the Constitution of the United States.

II.
JURISDICTION

2. Jurisdiction is conferred pursuant to 28 U.S.C. §§ 1331, 1343, and 1361 and 5 U.S.C. § 702, the Administrative Procedure Act. This is an action seeking declaratory relief (28 U.S.C. §§ 2201 and 2202), and preliminary and permanent injunctions to enforce rights under the First and Fifth Amendments to the Constitution of the United States, to wit, the right of free speech, equal protection of the laws, and due process of law.

3. The amount in controversy exceeds $10,000 exclusive of interests and costs, since the case involves the right of plaintiffs to participate in the Combined Federal Campaign and to, thereby, receive a fair share of the receipts of the Campaign which are in excess of $100,000,000 per year.

III.
PARTIES

4. *Plaintiffs*

A. The NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. (NAACP/LDF) is a body corporate organized under the laws of the State of New York and with the approval of the courts of that state. It is a legal aid society whose purpose is to render legal assistance gratuitously to black persons seeking the vindication of their civil rights and constitutional rights. It is approved by the United States Internal Revenue Service as a charitable, tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. Under New York law, it is authorized to conduct business in the District of Columbia.

B. The PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. (PRLDEF) is a not-for-profit corporation organized under the laws of the State of New York to provide free legal assistance to Puerto Rican and other Hispanics seeking to vindicate their civil and constitutional rights. It is approved by the United States Internal Revenue Service as a charitable, tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. Under New York law, it is authorized to sue and be sued under its corporate name.

C. FEDERALLY EMPLOYED WOMEN LEGAL AND EDUCATION FUND, INC. (FEWLEF) is a not-for-profit corporation organized under the laws of the District of Columbia to provide free legal assistance to federal employees seeking vindication of their right to be free of discrimination in employment and to provide education and training related to federal employment matters. It is approved by the United States Internal Revenue Service as a charitable, tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. Under the laws of the District of Columbia, FEWLEF is authorized to sue and be sued under its own name.

D. INDIAN LAW RESOURCE CENTER (ILRC) is a not-for-profit corporation organized under the laws of the District of Columbia to provide free legal assistance to Native Americans seeking to vindicate their constitutional and legal rights. It is approved by the United States Internal Revenue Service as a charitable, tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. It is authorized to sue and be sued under its corporate name.

E. THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW (the Lawyers' Committee) is a not-for-profit corporation organized under the laws of the District of Columbia to provide free legal assistance to minority and impoverished citizens to vindicate their civil and constitutional rights. It is approved by the United States Internal Revenue Service as a charitable, tax-exempt organization under Section 501(c)(3) of the Internal Revenue

Code. It is authorized to sue and be sued under its corporate name.

F. The SIERRA CLUB LEGAL DEFENSE FUND, INC. (Sierra Club LDF) is a not-for-profit corporation organized under the laws of California to support and enforce laws protecting the environment, primarily through legal actions brought on behalf of affected individuals and organizations. It is approved by the United States Internal Revenue Service as a charitable, tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. It is authorized to sue and be sued under its corporate name.

G. The NATURAL RESOURCES DEFENSE COUNCIL, INC. (NRDC) is a not-for-profit corporation organized under the laws of New York dedicated to the wise management of natural resources, enhancement of environmental quality, and reduction of health risks from pollution. It is approved by the United States Internal Revenue Service as a charitable, tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. Under New York law, it is authorized to sue and be sued under its corporate name.

5. *Defendant* Donald J. Devine is sued in his official capacity as Director, Office of Personnel Management, (hereinafter OPM) as agency of the United States. As Director of the OPM, he is charged with directing the Combined Federal Campaign (hereinafter CFC), the exclusive means by which private charitable organizations are able to solicit federal employees and military personnel at their places of work or assignment.

IV.
FACTS

6. The Combined Federal Campaign (CFC) was originally established as a result of Executive Order No. 10927 in 1961. Executive Order No. 10927 has been superceded by Executive Order 12353 as amended by Executive Order 12404, a copy of which is attached hereto. Under the Orders and implementing regulation (5 C.F.R. Part 950), all charitable solicitation of federal military and personnel at their places of work must be carried out under the auspices of the CFC.

7. Direction and control over the CFC was given first to the United States Civil Service Commission and then to the Office of Personnel Management, its successor agency. Final authority over which private charitable organizations would be allowed to participate in the CFC was given first to the Chairman of the Civil Service Commission and then to the Director of OPM, the defendant herein.

8. Under the CFC, funds donated by individual federal personnel are of two kinds, *designated* and *undesignated*. An individual may designate any organization approved for inclusion in the CFC to receive a specified contribution each pay period. The specified amount of money is automatically deducted from the individual's pay check and transmitted to the designated agency. If the individual does not designate a particular agency to receive his or her funds, the funds are put into a pool which is divided between the agencies accepted into the CFC. Only agencies whose applications are accepted for inclusion into the CFC can receive funds. Therefore, an agency that has been denied inclusion cannot solicit federal personnel at their places of work or assignment. Moreover, a federal worker, whether civilian or military, cannot give money to a charitable agency of his or her choosing through the check-off method if the agency has not been approved for inclusion in the CFC.

9. As noted above, each of the plaintiffs is a not-for-profit charitable organization approved by the Internal Revenue Service as a tax-exempt organization under Section 501(c)(3) Internal Revenue Code. Each of the plaintiffs has as a major part of its activities the conduct of litigation on behalf of minorities or other persons to carry out the laws and Constitution of the United States. As detailed in affidavits filed with this complaint the organizations bring actions in such areas affecting the public interest as equal employment opportunities, fair housing, voting rights, health care, education, the environment, the rights of native Americans, etc. In addition to these activities some of the plaintiffs have scholarship programs and conduct a variety of educational and community development activities related to their purposes.

10. The plaintiffs provide legal services at no cost to individuals, groups of individuals, and organizations seeking to vindicate their statutory, civil, and constitutional rights under the laws of the United States. In many instances clients are indigent or have incomes below the poverty line. Moreover, since most of the cases the plaintiffs handle are class actions or involve complex issues, the costs of the litigation are far beyond the means of their clients, even those with substantial incomes. The activities of organizations such as the plaintiffs have been held on a number of occasions to be protected by the First Amendment to the Constitution of the United States. *NAACP* v. *Button*, 371 U.S. 415 (1963); *In re Primus*, 436 U.S. 412 (1978).

11. As a direct result of the legal services plaintiffs provide, hundreds of thousands of persons receive tangible and intangible benefits. For example, class members in employment cases have received tens of millions of dollars in back pay, increased pension rights and have received incalculable direct future benefits, including increased salaries over the rest of their working lives. As a result of health care and prison litigation thousands of persons will have access to improved care in new and upgraded hospitals and other health facilities. Litigation brought in the area of education has brought improved education in the form of integrated and bilingual education and better programs for the under privileged. In the area of the rights of native Americans, improved health care, education, and the establishment of rights to land and housing has been accomplished.

V.
EXHAUSTION OF ADMINISTRATIVE REMEDIES

12. In 1980 two of the plaintiffs herein (NAACP/LDF and PRLDEF) were denied admission to the CFC. This denial was pursuant to the then existing "direct services rule." As a result of litigation, this Court held the direct services rule unconstitutionally vague and prohibited its future use. NAACP Legal Defense and Educational Fund, Inc., 504 F. Supp. 1365 (D.D.C. 1981). Following that decision OPM in 1981 approved for participation in the CFC all legal defense fund type organizations that applied, including a number of the plaintiffs.

13. In 1982 a new executive order was issued, E.O. 12353, as were implementing regulations found at 5 C.F.R. Part 950. The new regulations specifically permitted the inclusion of legal defense funds as participants in the Combined Federal Campaign. As a result the remaining plaintiffs were admitted to the CFC in 1982.

14. In the summer and fall of 1982 an alleged "controversy" over the inclusion of legal defense funds arose. As a direct result there was issued on February 10, 1983 Executive Order 12404. The announced purpose of the executive order was to permit the future exclusion of legal defense funds, including a number of the plaintiffs by name, in an attempt to satisfy the requirements established by the earlier decision of the court in *NAACP Legal Defense and Educational Fund, Inc.* v. *Campbell*, 504 F. Supp. 1365 (D.D.C. 1981).

15. Although defendant has announced his intentions of disapproving plaintiffs and other legal defense funds for future participation in the CFC new regulations have not as yet been issued. Based on past experience it is probable that decisions on the applications of plaintiffs for inclusion in the 1983 CFC will not be decided upon at the national OPM level until June. If plaintiffs are denied, by the time they receive an adjudication of the legality of that denial it will be too late to apply successfully to the hundreds of local CFC's in order to actually participate in the Combined Federal Campaign for 1983. Because of these circumstances, and because defendant has made clear his intention of disapproving the plaintiffs for continued participation in the Combined Federal Campaign further exhaustion of administrative remedies will be futile.

VI.
VIOLATION OF CONSTITUTIONAL RIGHTS

16. The rejection of plaintiffs' applications to participate in the Combined Federal Campaign will violate their rights under the First and Fifth Amendments. *First*, if the Executive Order in fact authorizes the rejection of plaintiffs' applications for the reasons given, then it violates the First Amendment on its face. *Second*, if it does not so authorize, then it is applied in violation of the First Amendment and is

applied arbitrarily and capriciously in violation of the guarantees of due process and equal protection embodied in the Fifth Amendment.

VII.
IRREPARABLE HARM

17. Plaintiffs will suffer irrevocably the loss of substantial donations from federal civilian and military personnel, thus hampering them in carrying out their First Amendment protected activities. There is no adequate remedy at law available to the plaintiffs.

VIII.
RELIEF

18. Wherefore, for the foregoing reasons plaintiffs pray:

1. That the court issue a declaratory judgment that the denial of plaintiffs' applications to participate in the Combined Federal Campaign violates their rights under the First and Fifth Amendments;

2. That the court issue a preliminary and permanent injunction enjoining defendant, his agents, employees, and successors in office, from failing to take all necessary steps to ensure the inclusion of plaintiffs as participating organizations in the Combined Federal Campaign;

3. That the court enjoin the defendant, his agents, employees, and successors in office, from excluding plaintiffs from the CFC in the future on grounds that violate the First and Fifth Amendments;

4. That plaintiffs receive their costs and attorneys' fees in this matter; and

5. That the court grant such other and future relief as may be just and equitable.

Respectfully submitted,

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LOWELL JOHNSTON
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Attorneys for Plaintiffs

VERIFICATION

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

CHARLES STEPHEN RALSTON, being duly sworn, deposes and says that he is employed by the plaintiff NAACP Legal Defense and Educational Fund, Inc. herein in the position of First Assistant Counsel; that he has read the foregoing complaint and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

/s/ Charles Stephen Ralston
CHARLES STEPHEN RALSTON

Sworn to and subscribed before me on this 25th day of March, 1983.

/s/ Ivalina R. Passé
Notary Public

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS,

v.

HON. DONALD J. DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT.

AFFIDAVIT OF PHYLLIS McCLURE

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Phyllis McClure, being duly sworn, deposes and states:

1. I am a member of the staff of the NAACP Legal Defense and Educational Fund, Inc. In that capacity, I attended a Press Conference at the Office of Personnel Management on February 10, 1983 from five to six p.m., at which the new Executive Order on the Combined Federal Campaign was announced. The Press Conference was conducted by Joseph A. Morris, the General Counsel of the Office of Personnel Management.

2. Mr. Morris announced that the President had signed an Executive Order that afternoon at the White House which set forth new rules for participating in the Combined Federal Campaign. He stated that the purpose of this Executive Order is to overcome the Court decision that the prior rules for the Combined Federal Campaign were vague. This Executive Order is to assure a focus on "direct services" for the Combined Federal Campaign. It expressly excludes advocacy groups which influence public policy. Certain legal defense funds may be excluded, but legal aid groups will not. The distinction, Mr. Morris said, is that the legal defense funds discriminate in the cases they take on the basis of a cause, while legal aid groups provide services to all who are in financial need. Mr. Morris concluded his

introductory remarks with the announcement that regulations would be issued by the Office of Personnel Management in the future.

3. In response to a reporter's question about the line drawn between legal defense funds and legal aid societies, Mr. Morris said: "The line will be drawn by the conduct of the organization. If it discriminates on the basis of a cause or legal theory, rather than need, then it will be excluded. The line is not sharply drawn now but it will be in the regulations."

4. Another reporter asked what the figures were for this year's Combined Federal Campaign. Mr. Morris did not have the exact numbers but did say that there had been a slight increase in overall dollars, that the increase had not kept pace with the inflation, and that participation had declined. He made reference to threats of union boycotts in last year's Campaign and to letters, telegrams and phone calls to the Office of Personnel Management protesting the participation of new groups.

5. Another reporter questioned Mr. Morris' figures on the last Campaign. Mr. Morris said there had been a 2% increase in total giving. Then he asked an Office of Personnel Management official who was standing in the back of the room what the exact figures were. That official stated that there had been a 4% to 7% increase in total giving.

6. Mr. Morris also announced that the Special Contribution Fund of the NAACP would remain in the Combined Federal Campaign.

7. The Office of Personnel Management distributed a press release and attachments at the press conference. Attached hereto as Exhibit "A" is a true and accurate copy of the materials which I obtained at the press conference.

/s/ Phyllis McClure
PHYLLIS MCCLURE

Sworn to and subscribed before me this 21st day of March, 1983.

/s/ Gloria A. Jones
Notary Public

My Commission expires on: March 30, 1984

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
1900 E St., NW
Washington, D.C. 20415
News Unit, Room 5F10
(202) 632-5491

For Immediate Release
Thursday, February 10, 1983

PRESIDENT ORDERS FEDERAL DRIVE TO FOCUS ON CHARITY FOR TRULY NEEDY

(Washington, D.C.)—President Reagan has ordered the Combined Federal Campaign (CFC), the annual charity drive conducted nationwide in Federal workplaces by Government employees, to focus its support on voluntary health and welfare programs that are aimed directly at the needs of the poor, the infirm, the hungry, and the truly needy, according to Donald J. Devine, Director of the U.S. Office of Personnel Management (OPM), who oversees the CFC.

Devine announced the Presidential directive as he released copies of the new Executive Order that was signed today in Washington.

"President Reagan has now stated in unequivocal terms the purposes of the CFC," Devine said. "They are to lessen the burdens of government and of local communities in meeting needs of human health and welfare; to provide a convenient channel through which Federal public servants may contribute to these efforts; to minimize disruption of the workplace and costs to taxpayers; and to avoid the reality and the appearance of the use of Federal resources in aid of fund-raising for political and advocacy groups.

"The CFC will now put its emphasis entirely on support for those programs that help sustain the safety net for people in need," Devine continued. "The President has limited eligibility for participation in the Combined Federal Campaign to voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals and families," he said.

The President's order includes a provision for local charities that are unaffiliated with any national organizations or umbre'la groups which will be permitted to take part in their respective local CFCs, provided that they meet the President's health and welfare criteria.

Devine said that such services "must consist of care, research, or education in the fields of human health or social adjustment and rehabilitation; relief of victims of natural disasters and other emergencies; or assistance to those who are impoverished and therefore in need of food, shelter, clothing, education, and basic human welfare services."

According to Devine, "The President has expressly excluded from the CFC any organization that seeks to influence elections or public policy determinations through political activity or advocacy, lobbying, or litigation on behalf of parties other than itself. This means," he explained, "that the advocacy groups, both left and right, that have been admitted to the CFC in recent years will be excluded from the campaign. Federal workers remain absolutely free, of course, to contribute to such organizations if they wish, but the taxpayers will not be asked to provide the fund-raising channel."

Devine further explained that the President's order will exclude from the CFC legal defense funds that litigate selectively on behalf of particular causes, while it will permit participation by legal aid programs that furnish legal services, without discrimination, to those in financial need.

Devine said, "This Presidential order was motivated by the deep conviction of this Administration that private sector contributions to the essential safety net should be encouraged and supported, and that it is unfair and unjust to have the Federal Government using its resources to promote any political or advocacy group, however well-intentioned it may be."

He acknowledged the controversy that has surrounded the admission of advocacy groups to the CFC in recent years. "That resulted from court findings that previous CFC rules were too vague and ambiguous to permit the CFC to focus exclusively on direct health and welfare services," Devine explained, adding: "President Reagan has now brought that vagueness and ambiguity to an end. Both the Department of Justice and our General Counsel are satisfied that the new directive is constitutional, and the President and I have been so advised."

Devine also acknowledged the fierce opposition of Federal employee organizations and labor unions to the recent past inclusion of advocacy groups in the CFC. "Sentiment favoring a wholesale boycott of the CFC was strong this last year," he said, "but the forbearance of Federal workers was heartening. Most workers still contributed to the campaign, but earmarked their donations for specific charities, thereby avoiding the possibility that their gifts would go to unwanted recipients." Devine added, "We asked the Federal workers to stay with the campaign and to give us one year to clean it up. They kept their part of the bargain, and now President Reagan has fulfilled our promise."

Devine noted that the new Executive Order also contains the following directives: International organizations that provide health and welfare services overseas will be permitted to participate in the CFC, even though, for obvious reasons, they may not provide any direct services in local American communities where Federal workers reside.

Devine said that he would soon publish proposed CFC regulations implementing the new Executive Order, and that organizational efforts for the Fall, 1983, CFC will shortly begin.

THE SECRETARY OF TRANSPORTATION
Washington D.C. 20590

December 16, 1982

MEMORANDUM FOR THE PRESIDENT

I understand you are giving favorable consideration to a revision in the Executive Order authorizing the Combined Federal Campaign. The revision will establish the CFC as a campaign to support voluntary agencies providing direct health and welfare services, and will exclude organizations involved primarily in promoting and advocating for special groups and special interests.

As the CFC Chairman this year, I know from firsthand experience that the campaign was seriously damaged by the controversy and anger created by the inclusion of many legal defense funds and other special interest groups which are not providing direct health and welfare services. We have suffered from unions boycotting the CFC; CFC headquarters has received an unprecedented 1,500 telephone calls and many letters from angry Federal employees, and participation probably will be down by 5,000 to 10,000 contributions from last year—all related to the inclusion of organizations which have "politicized" the campaign.

Although revising the Executive Order to exclude legal defense funds and other special interest groups will no doubt create a substantial negative reaction from the groups excluded, that reaction should be short term. I believe strongly that in the long term the survival of the CFC as a charitable cause—above controversy—whose sole purpose is serving the basic needs of all people, is absolutely dependent upon the suggested Executive Order revision.

I recommended the Executive Order be revised to protect the future of the CFC as a major positive force in voluntarism.

/s/ Drew Lewis

UNITED STATES SENATE
Washington, D.C. 20210
September 20, 1982

Mr. Benjamin T. Toyama
President
Hawaii Federal Employees Metal
Trades Council
P.O. Box 716
Aiea, Hawaii 96701

Dear Ben:

We are writing to express our deep concern over the possibility of a union boycott against the Aloha United Way (AUW) and the Combined Federal Campaign (CFC).

It is our understanding that this boycott was prompted by a recent decision of the CFC National Eligibility Commission which voted to admit the National Right to Work Legal Defense Fund to the group of agencies eligible to receive charitable contributions from federal employees under the Combined Federal Campaign. While we strongly agree with organized labor that the National Right to Work Legal Defense Fund has no place in a broad-based charitable appeal like the Combined Federal Campaign, we are concerned that a boycott of the CFC and the Aloha United Way by federal employee unions would place the success of the Combined Federal Campaign in Hawaii in jeopardy. Needless to say, the deep cuts made by the current administration in human service programs have made a successful AUW/CFC campaign imperative.

As you know, the Aloha United Way is only one of the many organizations participating in the Combined Federal Campaign. We have been assured by the Aloha United Way that none of the funds it receives directly or as undesignated funds from the CFC will go to the National Right to Work Legal Defense Fund. The Aloha United Way intends to continue its past efforts to limit eligibility in the Honolulu Area CFC to charitable agencies providing direct human care services in the fields of health and welfare.

Under the rules of the Combined Federal Campaign, the National Right to Work Legal Defense Fund will only receive monies federal and postal employees specifically des-

ignate as contributions to that group. We are informed that the AFL-CIO is urging all federal and postal union members not to designate this organization as a recipient of any of their CFC contributions. Officials of the national United Way have advised the AFL-CIO that its affiliates will distribute undesignated funds only to those agencies that have historically received such funds, and not to groups such as the Right to Work Foundation.

We also pledge to you and the other federal and postal employees unions that we intend to join other Members of Congress and the AFL-CIO in studying the structure of the Combined Federal Campaign and examining the need to revise the rules for participation in the program by charitable organizations.

For these reasons, we urge you, as President of the Federal Employees Metal Trades Council, to cancel the boycott by your membership of the Aloha United Way and the Combined Federal Campaign. Without your support, and that of the rest of organized labor in Hawaii, our State's voluntary human service organizations will be unable to provide vital services to needy citizens of our State.

Sincerely,

/s/ _____
DANIEL K. INOUYE
U.S. Senator

/s/ _____
SPARK MATSUNAGA
U.S. Senator

/s/ _____
DANIEL K. AKAKA
Member of Congress

/s/ _____
CEC HEFTEL
Member of Congress

Saturday, January 13, 1983—The Washington Post

GROUPS FIGHT EJECTION FROM CHARITY DRIVE

By Karlyn Barker
Washington Post Staff Writer

A broad range of health, minority, women's and environmental groups, protesting what they say is an attempt to kick them out of the federal government's annual charity drive, have asked President Reagan to reject a United Way proposal to limit eligibility in the Combined Federal Campaign.

Most of the groups were admitted to the CFC under the terms of an executive order issued last year by the president. They said they have heard the White House is considering issuing a new order that would result in about three dozen "non-traditional" charity organizations being kicked out of the campaign, at an estimated loss to them of more than $4.5 million.

"Federal employees like having a broader range of charities to support," the groups said in a letter to Reagan signed by 18 organizations, among them the Native American Rights Fund, the Committee for Responsive Philanthropy, the Center for Science in the Public Interest, and legal defense funds for Federally Employed Women and the Sierra Club. They urged him to reject the United Way proposal as directly contradicting Reagan's efforts to increase private giving.

Last September, United Way of America asked the White House to restrict participation in the CFC to "charitable agencies providing direct, human-care services in the fields of health and welfare, including health research." United Way argued that inclusion of less traditional service groups had hurt charity contributions.

The example cited in the letter to Reagan was the National Right to Work Legal Defense Foundation, whose admittance to the CFC last year, United Way said, had sparked a boycott of the campaign by some unions.

CFC raised $87 million in employee contributions in 1981, $12 million of it in the Washington area. But a controversy

in recent years over the number and types of organizations that should be allowed to participate has kept the campaign in legal and political upheaval.

Some groups, usually those long established in the drive, have argued that opening the campaign to many, new organizations confuses givers and spreads contributions too thin. But groups who have gone to court to gain admittance say expanding the CFC has increased overall donations by providing a wider choice of charities.

"... When employees have more choice of charities to support, they give more," the charity groups said in their letter, to be sent to Reagan today. They said that, according to the Office of Personnel Management, charitable giving in federal offices is up more than 7 percent this year, the first time since 1977 that the increase in giving outpaced inflation.

Rocky Mountain News, Wed., Dec. 29, 1982, Denver, Colo.

REAGAN EYES ACTIVIST FUND CUT

By John Bennett
Scripps-Howard Staff

WASHINGTON—President Reagan is considering an executive order to halt a growing number of activist organizations from using federal employee payroll deductions to finance their causes.

Officials of the Combined Federal Campaign warn that unless Reagan restricts the groups, their 20-year-old fundraising efforts in behalf of such organizations as the Red Cross and Salvation Army could be seriously impaired.

Bill Schaeffler, director of the 294-organization charity campaign in the Washington, D.C., area, said federal worker opposition to 34 new activist groups was chiefly responsible for 9,000 fewer workers contributing to traditional health and welfare causes this year.

A federal court here ruled two years ago that the National Association for the Advancement of Colored People Legal Defense Fund and the Puerto Rican Legal Defense Fund may share funds from the Combined Federal Campaign, unless they were specifically excluded by presidential order.

Officials with the Office of Personnel Management report 50 new checkoff applications for 1983. "If the trend continues, the campaign will be unmanageable," said Joseph Morris, general counsel for OPM.

The traditional organizations joined the combined campaign after President Kennedy authorized it in 1961. About 260 groups would remain if Reagan restricts membership.

Some of the new groups include the National Right to Work Educational Foundation, the Sierra Club, Planned Parenthood, National Organization for Women Legal Defense Fund, the Children's Defense Fund and the Conservative Legal Defense Education Fund.

One pending application is from the National Association for the Advancement of White People, which wants to fi-

nance white supremacy propaganda through federal employee contributions.

"If the NAACP Legal Defense Fund can do it, why can't we?," asked David Duke, a former Ku Klux Klan leader and president of the three-year-old, 5,000-member Louisiana-based organization.

Wednesday, August 4, 1982—The Washington Post

AN UNCHARITABLE BATTLE FOR THE CONTRIBUTIONS OF FEDERAL WORKERS

By Karlyn Barker
Washington Post Staff Writer

The AFL-CIO is furious that the National Right to Work Legal Defense Fund got in. The National Right to Life people, who just got in themselves, want Planned Parenthood out, and Planned Parenthood, still in although it almost got kicked out, has gone to court because it is no longer as in as it used to be.

Being in, in this case, means being included in the government's $87 million Combined Federal Campaign, an annual charity drive that has sparked some rather uncharitable battles for the contributions of federal workers.

In the past several years a number of advocacy groups have successfully sued to be included in the campaign, arguing that their work is just as worthy as more traditional charities. The latest battle has a more ideological edge to it, and the long controversy over who should be in and who should be out has never been more heated.

Donald J. Devine, director of the Office of Personnel Management and a Reagan appointee with impeccable conservative credentials, last month certified the National Right to Work Legal Defense Fund, a probusiness, antiunion group, the antiabortion National Right to Life Educational Fund and 109 other organizations for participation in this year's campaign. Including Planned Parenthood among those groups, he overruled a Devine-appointed eligibility committee, which had recommended the organization's exclusion.

Devine said all the groups met the criterion for participation in the campaign, to which federal workers may contribute through payroll deductions.

But Devine's decision has brought howls of protest from prolabor and antiabortion camps.

AFL-CIO president Lane Kirkland called Devine's admission of the Right to Work group, which opposes compul-

sory union membership, "an insult to President John F. Kennedy," who set up the charity campaign in 1961. The labor leader said federal workers were being asked to contribute to an organization whose goals are contrary to their own interests.

And at a meeting this week of 36 unions who represent federal workers, Kirkland said organized labor would fight to have the Right to Work group's eligibility rescinded and would urge federal employes, some of whom are said to believe the group promotes the creation of jobs, not to contribute to the organization.

OPM spokesman Pat Korten said yesterday that while no prolabor group is included on the government's charity list, there is nothing to preclude a labor organization from qualifying for the campaign under current guidelines. An AFL-CIO spokesman said in New York that prolabor forces didn't want to have to qualify as a charity in order to prove that antilabor forces are not a charity.

Also unhappy is the National Right to Life Committee, which, though newly admitted to the Federal charity circle, wants Planned Parenthood excluded. The group has complained Planned Parenthood is "the largest promoter and provider of abortion in the country" and as such "has no place" in the government's charity drive.

Devine, an ardent abortion foe, said he was "reluctantly" allowing Planned Parenthood to continue in the campaign because he felt it met OPM's eligibility requirements. But the National Right to Life group has challenged that assessment and called on OPM to investigate what it says are Planned Parenthood's numerous violations of government solicitation restrictions.

Planned Parenthood, which has denied the Right to Life assertions, has its own problems with Devine and this week took the OPM director to court to try to overturn his reclassification of the family planning group. OPM has shifted the group, which raised about $800,000 in last year's charity drive, from the International Services Agencies campaign category to the National Service Agencies category, a move Planned Parenthood says will cost it about $200,000 in charity contributions.

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In a letter to attorneys for Planned Parenthood, Devine said the organization's activities are "significantly domestic in scope" and that only 10.6 percent of its revenues are spent on international services. He said Planned Parenthood will still be entitled to all the contributions specifically earmarked for it by federal donors.

A Planned Parenthood spokesman said yesterday that his organization is composed of 190 separate affiliates around the country.

September 13, 1982—Federal Times

NALC DELEGATES BACK SOMBROTTO, WILL BOYCOTT CFC

Vincent L. Sombrotto was reelected president of the National Association of Letters Carriers by acclamation of delegates to the Union's convention in San Francisco.

Eight other resident national officers and ten national business agents also were re-elected without opposition—the first time so many were unopposed since the one-man, one-vote rule took effect in 1964, a spokesman said.

These officers, and nine other officials to be elected by mail ballot, will serve four-year terms approved by the convention to replace the existing two-year terms.

The convention also approved non-contributory retirement programs for all national officers.

Per capita dues paid to the national office were raised from $68 to $72 a year.

Delegates voted to boycott the Combined Federal Campaign this fall because of the inclusion of the National Right to Work Legal Defense Foundation as a participating charity. The boycott will be lifted in local CFC areas which have rejected the Right to Work group as a participant, a spokesman said.

Sombrotto urged letter carriers to make contributions directly to charities by personal check rather than through the CFC payroll deduction plan.

A convention vote to boycott the United Way was later rescinded by the union's executive council after a United Way official assured Sombrotto that the charity umbrella group was not associated with the Right to Work organization.

Mail ballots will be distributed September 22 for contested positions in the union, including the slot of health insurance director, now held by R. J. Buntz. Three trustees and five national business agents also will be elected by mail referendum.

Re-elected without opposition to resident national officer positions were Tony R. Huerta, executive vice president; Francis J. Conners, vice president; Richard P. O'Connell,

secretary-treasurer; Ialline Overby, assistant secretary-treasurer; Joseph H. Johnson Jr., director of city delivery; Mark Roth, director of retired members; William M. Dunn Jr., director of life insurance; and Anthony B. Morell, assistant director of life insurance.

Re-elected as national business agents were David M. Bybee, Jim Edgemon, Lawrence Hutchins, Ben Johnson, Robert Massaroni, Gene McNulty, John W. O'Shea, Jack R. Sebolt, Robert Vincenzi and Wayne E. White.

Chosen as AFL-CIO delegates were Anita Guzik, Sid Klein, Mike O'Connor, J.C. Taylor and Ronald Tyeskey.

Honolulu Star-Bulletin—8/21/82

GOVERNMENT CHARITY DRIVE DRAWS BLAST

By Lea Catterall
Star-Bulletin Writer

The federal government was criticized yesterday by a group of federal employee unions for including anti-union organizations as beneficiaries of its annual charity drive.

Ben Toyama, president of the AFL-CIO Metal Trades Council, said the council may ask federal employees to boycott the Combined Federal Campaign because of its inclusion of the National Right to Work Legal Defense Foundation, the Pacific Legal Foundation and other "right-wing" groups.

Inclusion of such groups, especially the Right to Work organization, has prompted national outrage from labor unions. The Right to Work group has fought laws requiring union membership of employees in a business where the majority of workers want the union.

In testimony this week before the Federal Executive Board, which coordinates inter-agency federal programs here, Toyama called the charity campaign "a fraud and an evil money-making machine for organizations other than humanitarian charities."

EXECUTIVE board director Gerry Silva said no money raised in the campaign will go to the Right to Work foundation or any other "national service agency" that is not designated by the employee in his contribution form.

However, Toyama said the trades council, which includes 13 unions representing federal employees here, will not participate in a campaign "that raises funds for organizations that are not compatible with the principle and philosophy of the labor movement."

The Right to Work organization and other adversary groups were included in such federal charity campaigns this year by President Reagan.

Of nearly $1.9 million raised in last year's Combined Federal Campaign, $1.5 million went to Aloha United Way, about $325,000 went to national health and international

service agencies and $42,783 was designated for national service agencies.

Silva said he expects a lesser amount to go to national service agencies this year because of a change in rules of distribution. National service agencies last year received a share of the money that was collected without designation, but they will receive no undesignated money this year, he said.

Bremerton Sun—Tuesday, Oct. 19, 1982

Politicized CFC contributions lag

By Debby Norman
Sun Staff Writer

Donations to this year's Combined Federal Campaign, which is being boycotted by local unions, are running far behind the 1981 drive, according to Bremerton Metal Trades Council President, Larry Ferlaak.

Puget Sound Naval Shipyard's house organ, the *Salute*, reported Friday that donations totaled $41,760.48, or 14.2 percent of this year's shipyard goal.

The goal is $295,000.

But Ferlaak said that at the same point in last year's campaign, the PSNS part of the drive had reached 59 percent of its goal.

Bruce Andrae, shipyard public affairs officer, acknowledged that this year's CFC donations have been projected to fall behind last year's.

"But last year was a record year, Andrae said.

In last year's record-breaking CFC campaign, PSNS employees donated $344,299, exceeding the goal of $280,000.

Joseph E. Kieta, chairman of the Local Federal Coordinating Committee of the Kitsap-North Mason CFC, has attributed the lag to the union boycott of CFC.

"...Our CFC campaign could be a total failure for the first time in 19 campaigns," Kieta wrote in a letter to Donald J. Devine, head of the federal Office of Personnel Management.

Devine, a Reagan appointee, initiated the controversial policy changes which politicized the CFC drive and prompted the union boycott. Kieta's Oct. 15 letter was the second in three days written to protest the recent extension of politically oriented groups from the national to the local CFC.

"Approximately 70 percent of all eligible to participate in our local campaign are unit members of those unions boycotting our campaign," Kieta wrote.

"After two weeks into this CFC, Puget Sound Naval Shipyard, the largest contributor into the Kitsap-North Mason CFC, is only 15 percent of its goal (compared to) 59 percent after two weeks into the previous campaign."

CFC began Oct. 4 and will end Nov. 12.

The charity drive hadn't even begun when the county's major labor groups representing federal employees announced that they would boycott the drive. The unions acted in protest of Devine's inclusion of political groups in CFC for the first time in the drive's history.

Union leaders were especially irked at the inclusion of the anti-union National Right to Work Legal Defense Fund among the recipients of CFC money under the "National Service Agencies" category.

But OPM now is forcing the CFC to add political groups to the local CFC roster, too, according to Ferlaak.

OPM has ordered two such groups, the Sierra Club Legal Defense Foundation, Inc. and the conservative Pacific Legal Foundation, added to the local CFC list, Ferlaak said.

OPM overturned a decision by the local Federal Coordinating Committee not to allow the groups, Ferlaak said. Traditionally, the coordinating committee has determined which groups will be placed on the local CFC roster, in line with federal regulations. Ferlaak said OPM now is usurping that role.

Kieta is appealing both decisions. In letters to Devine dated Oct. 13 and Oct. 15, he noted that neither group has a local office, which is one of the criteria for a group to be placed on the CFC roster.

"Seattle, Wash., was listed as the local contact, but Seattle is not part of the Kitsap-North Mason local community," Kieta's letter noted.

In addition, he said, the campaign's literature already has been printed and it would be difficult to add the two organizations' names to 30,000 CFC brochures.

Meanwhile, an alternative charity effort supported by the unions appears to be moving slowly.

Ferlaak said this morning he has had about 50 "allotment" forms for the United Way campaign returned to his

office. But union officials supporting the United Way drive haven't really started pushing it yet, he added.

The allotment effort was started as a way for union supporters to bypass the CFC and give directly to the United Way by filling out "allotment" or payroll deduction forms.

The United Way receives most of the local CFC money, but United Way officials have voiced fears that this year's United Way drive might be hurt by the CFC boycott.

The Washington Times TUESDAY, JANUARY 18, 1983 / PAGE 11A

BEST AVAILABLE COPY

VETERANS ADMINISTRATION
Office of the Director

January 17, 1983

Honorable Donald J. Devine
Director
U.S. Office of Personnel Management
Washington, DC 20415

As Medical Center Director and Chairman of the Dallas-Fort Worth Federal Executive Board I wish to apprise you of my concern relating to the upcoming Combined Federal Campaign (CFC).

First, we were successful in last year's campaign because we devoted additional time and efforts to this important purpose. We spent additional time trying to explain to our employees the change taking place regarding the admission of nonhealth and welfare organizations. We were successful in getting them to support the CFC by asking them to designate the organization which they supported. Even though we met our goal dollar-wise the actual number of employees contributing decreased. I feel we cannot sustain this level of support for the 1983 campaign for the following reasons:

1. We cannot devote the additional time of our staff to further sell the CFC without detracting from our Agency mission.

2. Employees have made it clear they will not participate at all in the CFC if nonhealth and welfare organizations are admitted.

3. The AFGE local was convinced to support the CFC last year with the understanding that something would be done before the 1983 campaign. There was strong talk of boycotting the CFC last year by union members. It is my opinion that this will happen in 1983 if nonhealth and welfare organizations are admitted.

4. Employees do not trust the system of "designation" because of all of the confusion raised on the meaning of this term. Employees have expressed a desire to designate their gift but want the money to go to a local organization and not the national organization for distribution. I feel em-

ployees need this option if we expect them to continue supporting the CFC.

I feel compelled to urge you to respect the wish of our employees and agencies and take a firm stand to restrict the CFC to the traditional health and welfare organization. If you elect to continue admitting the nontraditional agencies you will lose the support of management, employees, employee organizations and the Federal Executive Boards, which have traditionally supported the CFC.

Please give this your personal attention and support.

/s/ C. Wayne Hawkins
C. WAYNE HAWKINS
Medical Center Director

DENVER METROPOLITAN AREA
COMBINED FEDERAL CAMPAIGN
Office of the Director

14 January 1983

Dr. Donald J. Devine, Director
Office of Personnel Management
1900 E. Street, NW
Washington, D.C. 20415

Dear Dr. Devine:

The 1983 Denver Metropolitan Area Combined Federal Campaign was a success. However, many complaints were received from management officials, union officials and members, and other Federal employees concerning the inclusion of nontraditional, activist health and welfare organizations.

The success of this year's campaign can be attributed to the outstanding efforts and commitment of agency managers, loaned executives, and other CFC staff. In addition, we were able to obtain the support of the American Federation of Government Employees, the American Postal Workers Union, and several smaller unions. Two unions did boycott this year's campaign with visible negative effects which these unions hoped to obtain. AFGE's support this year came with the promise to boycott the 1984 campaign if regulations continue to provide for inclusion of activist, political organizations such as the National Right to Work Legal Defense and Education Foundation, Inc.

Early responses to a sample survey conducted among Federal employees in our area show approximately 80 percent of the respondents preferring that CFC be restricted to traditional health and welfare organizations which provide for basic human needs. In narrative comments, many employees stated that although they supported this year's campaign, they would not support future campaigns if politically oriented, activist organizations continued to be included. Final results of this survey will be included in our after action report which will be forwarded at a later date.

I am confident that future CFC's will not succeed unless revisions to the existing regulations include exclusion of organizations involved in litigation for special interests or those of a political or quasi-political nature.

I understand current regulations governing the CFC are under review for possible revisions. I strongly encourage you to assure these revisions include changes to the eligibility criteria for participation by health and welfare organizations which restrict participation to only those charitable organizations providing traditional basic human needs. If such changes are not made, the future of the Combined Federal Campaign will be in jeopardy.

As Chairman for the 1984 campaign, I have a vested interest in future programs.

Sincerely,

/s/ Theodore D. Wood

THEODORE D. WOOD
Chairman
1984 Denver Metropolitan Area
Combined Federal Campaign

WESTERN UNION MAILGRAM
MAILGRAM SERVICE CENTER
MIDDLETOWN, VA. 22645

Donald J. Devine, 1/11/83
Director Office of Personnel Management
900 E St. Northwest
Washington, DC 20405

The labor community in the Seattle King County area does not and will not support the inclusion of non health and welfare agencies and organizations in the Combined Federal Campaign (CFC). Boycotts will again flourish in upcoming CFC and United Way campaigns if advocacy and other politically oriented organizations are included at the further expense of local health and welfare agencies and organizations. We urge you to modify the regulations accordingly.

CHARLES D. DAVIS
President National Treasurers Employees Union Chapter 30

WESTERN UNION TELEGRAM

January 11, 1983, 12:04 p.m.

Donald J. Devine,
Director,
Office of Personnel Management
900 E St. N.W.
Washington, D.C. 20415

Mr. Craig Fuller
Special Assistant to the President
White House
Washington, D.C. 20500

Director Office of Personnel Management
900 E St. N.W.
Washington, D.C. 20415

As a member of both organized labor and Heart of America United Way's Board, I strongly urge reconsideration of OPM's regulations for CFC agency. Those whose purpose is legal defense rather than health or welfare have no place in CFC, and can damage both CFC and United Way fundraising efforts.

cc: Lane Kirkland
President,
National AFL-CIO
815 16th Street, Northwest
Washington, D.C. 20006

Bill Aramony,
President,
United Way of America
United Way Plaza
Alexandria, VA 22314

Lillian McKittrick

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS,

v.

HON. DONALD J. DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT.

AFFIDAVIT OF CHARLES STEPHEN RALSTON

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

CHARLES STEPHEN RALSTON, being duly sworn, deposes and says:

1. I am presently employed by the NAACP Legal Defense and Educational Fund, Inc., in the position of First Assistant Counsel. One of my duties is preparing and overseeing the submission of applications for participation by the Fund in the Combined Federal Campaign.

2. In 1980 when the Fund first applied to participate in the final decision on our national application was not reached until June, although an action was filed in court in less than three weeks after denial a preliminary injunction was not granted and the net result was that the Fund received no moneys from the 1980 Combined Federal Campaign because it was held beginning in late August through Thanksgiving of that year.

3. In 1981 following this Court's order we were admitted to the Combined Federal Campaign after an initial denial by the Eligibility Committee. In June again of that year approval by the Office of Personnel Management as a national agency was only the first step in the application process.

An organization is not actually in any Combined Federal Campaign as a result of such approval but must file separate application to 560 local combined federal campaigns. Those locals then decide whether an organization meets the local eligibility requirements. In 1981 we prepared and filed applications within two weeks after the approval of the Fund's at the national level. Nevertheless many local CFCs denied our applications on the ground that they were too late under their local rules. A number of others denied applications on a variety of grounds because of the proximity to the beginning of the Combined Federal Campaign. We were unable to effectively challenge their denials. Thus, we were admitted to less than half of the local combined campaigns.

4. Because OPM had announced that they were going to substantially revise the existing regulations we did not seek to challenge our denial to local CFCs through litigation in 1981. Following a long period in which a proposed executive order was substantially modified the Office of Personnel Management finally issued new regulations in May, 1982. We had earlier filed an application under the old regulations at the nationwide level and had sent out applications to all 560 local CFCs in the spring of 1982. With the issuance of the new regulations we had to file a new national application and, after approval in late July, 1982, we filed a whole new set of revised application in all 560 local CFCs. This was done by mid-August, 1982. Again, we were denied by a substantial number of local CFCs and appealed a number of those denials to OPM. We were successful on some appeals, but were denied in others. Again it was too late in the year to secure judicial relief from these denials so that we could be included in all local combined federal campaigns by the time they began and ended in the early Fall. An action has been filed challenging the regulations leading to denials of participation by local campaigns and that action is presently pending before the Hon. Joyce Hens Green, C.A. No. 81-2999.

5. In early January, 1983 we filed with OPM our application for inclusion in the 1983 Combined Federal Campaign. Under the existing regulations since we have already been

approved as a national service agency we were simply required to provide updated information relating to our current budget, expenses, changes in our Board of Directors, et cetera. We have every expectation that under the new existing regulations we would be approved as a matter of course and be permitted to participate in the 1983 Campaign. To avoid the time problems from prior years we have also filed, under the present regulations, applications to all local combined federal campaigns. The process of preparing and sending out 560 separate applications was completed by the end of February, 1983. We expect to be admitted as a matter of course into close to half of the local CFCs under the existing regulations.

6. Based on three years of experience with the CFC application procedure, I would expect that if new regulations are issued, they would not be able to be in full effect until May, 1983, at the earliest. In the past the application and approval procedure has taken close to a month, and therefore we would not receive word of a final action on application under any new regulations until June. Even if we promptly start an action in court the chances are great that we would run into the same time problems as before, since not only would we have to be approved by OPM at the national level but 560 local combined federal campaigns would then have to act on our applications. Many of the local CFCs personally have told us that they have experienced great problems if applications are received late because they are unable to give them their full attention and they are faced with the problem of having fund-raising brochures and other materials printed in time for the beginning of the CFC. Indeed, a number of local CFCs have expressed gratitude towards us for having filed applications early in the process since that is of great aid and assistance to them. Therefore, the early resolution of the issue of whether plaintiffs will be approved at the national level will not disrupt the CFC but will be of benefit to it in being able to be conducted on a timely and organized basis.

7. Because of my involvement in the Legal Defense Fund's efforts to gain admission to the Combined Federal Campaign since late 1979 and early 1980 I have been kept

informed as to developments with regard to the executive order and regulations governing the same. I have obtained the information that follows either through personal knowledge, conversations with government officials, or through the documents attached hereto as Exhibits B through I.

8. Following the ruling of this Court in January, 1981 the new head of the Office of Personnel Management, Dr. Donald J. Devine announced that because of shortness of time all legal defense fund type organizations would be admitted pending the eventual promulgation of new regulations. See Exhibit B attached hereto, a true and accurate copy of OPM CFC Memorandum No. 81-2. In the summer of 1981 myself and other representatives of organizations that had been placed in the National Service Agencies group met with Dr. Devine to express our views as to any contemplated new regulations. Subsequently in October, 1981, we submitted to him a statement of our joint views. I was the principal author of the statement, which was signed by the National Service Agencies (NSA) group, organization representing 14 organizations. See Exhibit C attached hereto, which is a true and accurate copy of the NSA statement presented to the Office of Personnel Management. The position the NSA took was that the Combined Federal Campaign should be open to the widest possible range of organizations so that federal employees could chose the ones they themselves felt worthy of their support.

9. In December, 1981, it was learned that the Office of Personnel Management had submitted to the Office of Management and Budget a proposed new executive order which would seek to overcome one of the perceived difficulties discussed by this Court in its January, 1981 decision; *i.e.*, the direct services rule was not authorized by the existing executive order. Attached as Exhibit D is a true and accurate copy of the Memorandum from OPM to OMB. The new executive order would exclude legal defense funds and other litigating organizations, the NSA as a whole and many of its constituent organizations, including both of the named plaintiffs herein, made their opposition to the proposal known to officials at the White House.

10. Eventually, on March 23, 1982, a new executive order was issued, E.O. 12353, which made no substantive changes in the eligibility requirements to gain admission to the CFC. On July 6, 1982 OPM issued new regulations (5 C.F.R. Part 950) which completely superseded the Manual for Fund Raising in the Federal Service. The new regulations specifically included legal defense fund type organizations. A press release was issued by the Office of Personnel Management with the new regulations in which it was pointed out that the federal employees would now have a wide choice of charitable agencies from which to pick. Attached hereto as Exhibit E is a true and accurate copy of the OPM press release.

11. Both plaintiffs continued to be approved under the new regulations, and a number of other legal defense fund-type organizations were admitted. One of the organizations so admitted was the National Right to Work Legal Defense Foundation whose function is to support litigation challenging compulsory unionism. As a consequence a number of unions took the position that the CFC and the United Way should be boycotted entirely. See Exhibit F attached hereto, a true and accurate copy of a letter issued by the International Association of Mechanical and Aerospace Workers.

12. However, the AFL-CIO itself did not call for a boycott, but rather urged that federal employees designate the specific organizations they wished to support so that none of their money would inadvertently go to the National Right to Work Legal Foundation. Attached hereto as Exhibit G is a true and accurate copy of the statement by the AFL-CIO.

13. Shortly thereafter the executive committee of the Board of Governors of the United Way of America passed a resolution urging that the Combined Federal Campaign be limited to the provision of "direct health and welfare services". The resolution specifically pointed to the alleged controversy arising from the inclusion of certain organizations. The resolution was brought to the attention of the White House. Attached hereto is Exhibit H which is a true and accurate copy of the United Way resolution and a letter addressed to the White House.

14. Plaintiffs and other organizations again made their views known to the White House and urged that excluding organizations based on the nature of their programs would violate the Constitution and would be contrary to the principle that federal employees should be able themselves to decide between a wide range of organizations. Attached hereto is Exhibit I, a true and accurate copy of the letter sent by the Director-Counsel of the NAACP Legal Defense and Educational Fund to the President of the United States expressing the views of the Fund with regard to the Combined Federal Campaign. In the letter to the White House the Legal Defense Fund pointed out that, contrary to some statements, it had not been its experience that donations had gone down. Indeed, the Fund attached to the letter a memorandum sent out by the Milwaukee Wisconsin CFC noting that not only had the 1982 CFC exceeded the prior year's record receipts but had exceeded its goal by more than $60,000. In general, the pledges to the NAACP Legal Defense Fund have been greater in 1982 than in the prior year.

15. As a NSA group member the Legal Defense Fund has just recently received a report from the capital area Combined Federal Campaign dated March 2, 1983. The capital area CFC encompasses the Washington, D.C. area and is by far the largest single contributor to the overall CFC. This report shows that of over $13 million in total pledges, more than $1 million had been pledged by federal employees, as of March 2, to NSA group members. Of this $1 million, 32% has been pledged to legal defense fund type organizations, including the plaintiffs and similar organizations. Thus, as of that date federal employees in the Washington, D.C. area had contributed more than $350,000 to legal defense fund organizations despite their alleged "controversial" character. Since in the past the capital area Combined Federal Campaign has represented approximately 12% of all CFC receipts nationwide it can be estimated that legal defense fund overall can expect to receive about $2 million in donations from federal employees and

military personnel. Indeed, the National Right to Work Legal Foundation itself has received to date $30,000 in designated pledges from the capital area CFC, despite the controversy over its inclusion. Thus, it is clear that many thousands of federal employees wish to contribute to organizations such as plaintiffs through the CFC payroll deduction system. Attached hereto as Exhibit J is a true and accurate copy of the March 2, 1983 report from the capital area CFC just received by plaintiffs.

16. On December 13, 1982 I attended a meeting in New York City sponsored by Philanthropy Weekly. Dr. Donald J. Devine, Director of OPM appeared and spoke concerning the Combined Federal Campaign. At that meeting he stated that initial projections indicated that receipts for the CFC were up 7% over receipts in 1981.

17. On March 18, 1983, we obtained a copy of a memorandum dated February 2, 1983, from defendant Donald J. Devine to the Assistant to the President for Cabinet Affairs. The memorandum, a true and accurate copy of which is attached hereto as Exhibit K, explains the reasons and bases for the new executive order.

/s/ Charles S. Ralston
CHARLES STEPHEN RALSTON

Sworn to and subscribed before me this 23rd day of March, 1983.

/s/ Gloria A. Jones
GLORIA A. JONES
Notary Public

EXHIBIT B, RALSTON AFF.; C.A. NO. 83-

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

June 9, 1981

CFC MEMORANDUM NO. 81-2

MEMORANDUM FOR DEPARTMENT AND AGENCY FUND-RAISING PROGRAM COORDINATORS AND CHAIRMEN, FIELD COORDINATING GROUPS

SUBJECT: 1981-1982 Fund-Raising Bulletin for the Combined Federal Campaign

I. THE COMBINED FEDERAL CAMPAIGN

The Combined Federal Campaign has been the subject of a great deal of recent attention and controversy. In spite of these difficulties, the traditional generosity of Federal employees, and the dedicated work of volunteers in agencies at all levels has resulted in an outstanding response to the many worthwhile needs that are represented in these campaigns. I urge that Federal employees continue this much needed support.

In a recent decision by the U.S. District Court for Washington, D.C., *National Legal Defense & Education Fund, Inc.*, v. *Alan Campbell*, the Court exhorted action by the Office of Personnel Management. The Court said, "It behooves the government officials responsible for the [CFC] program to re-examine the basic premise on which the program was established so that more acceptable standards can be developed which will assure continuation of the government's significant and useful support for worthy charitable solicitation." I am determined that the Office of Personnel Management turn its attention to this important task. In the past, the program has been inadequately administered and too loosely regulated by OPM.

Although past congressional hearings, Court decisions, and discussions by affected public and private officials prepare one to understand that there are problems with the administration and regulation of the program, the more

deeply one goes into the matter, the more apparent is the need for clearer direction and more precise standards. In this year's submissions for eligibility to the CFC, the Committee on Private Voluntary Agency Eligibility (called the Eligibility Committee) has found over 30 examples where eligibility criteria have not been clearly met. The Eligibility Committee report to the Director recommends: "that, if the deficiencies noted above are not corrected in applications submitted for the full 1982 campaign, the Director deny renewal of fund-raising privileges. All applications must be treated in a fair and consistent manner."

The present criteria for eligibility are set forth in the "Manual on Fund-Raising Within the Federal Service for Voluntary Health and Welfare Agencies." The Manual has an ambiguous status as a regulatory guideline. It would have firmer legal grounding if it were based on a Federal Personnel Manual issuance, a Federal Register issuance, Executive Order, or a statute.

The campaign was established pursuant to Executive Order 10927, issued on March 18, 1961. That Order delegated authority to the Chairman of the Civil Service Commission (now Director, Office of Personnel Management) to:

> make arrangements for such national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate to solicit funds from Federal employees and members of the Armed Forces at their place of employment or duty statior..

Because of the discretion given to the Director of the Office of Personnel Management by the Executive Order, additional regulatory authority was recognized. This resulted in the publication of the Manual. The appropriateness of regulation was accepted in *NAACP Legal Defense and Education Fund, Inc. et al.*, v. *Alan Campbell*, although the Court did not rule on whether it would have been more appropriate through FPM or Federal Register issuance.

II. GOVERNMENT INTEREST IN REGULATING THE CFC

NAACP-LDEF, et al, v. *Campbell* finds a "legitimate government interest" (page 8, line 4) to conduct the CFC. Yet, the Court also finds that there are First Amendment

protections which related to the conduct of the CFC. It does this on the basis that "by providing organizations the opportunity to participate in the CFC, the government has, in effect, provided a billboard or a channel of communication" (page 4, line 14). But the Court is absolutely clear that it recognizes "the CFC itself serves the legitimate government interest in regulating interference with employees during the work day, and insuring that organizations with access to employees at the workplace are responsible in the use of monies collected" (page 8, line 4).

Although some have argued that the First Amendment protection is absolute, and therefore that all applicants must be admitted to the campaign, it is clear that the Court in *NAACP-LDEF et al* v. *Campbell* recognizes limits on First Amendment rights. The Court, first, recognizes that the Combined Federal Campaign itself is a limit on the First Amendment right to direct access to government employees by individual charitable agencies. The Court very precisely gives criteria which would allow "the legitimate government interest" to be applied. It mentions "fraud, crime and undue annoyance" (page 8, line 4). For budget-based criteria, it holds that there must be a "screening of the budget." And percentage base restrictions cannot be "unformulated" (page 6, line 19). Again, to exclude organizations, evidence must be presented which is "appropriate" (page 7, line 22). And the Court says such criteria cannot be established "cavalierly" (page 7, line 27).

Therefore, it is clear that the Court in *NAACP-LDEF et al* v. *Campbell* recognizes a legitimate government interest to regulate in this area. This interest likewise is recognized in other strong First Amendment protection cases, such as *Schaumburg* v. *Citizens for Better Environment* (44 US 620, 87 L Ed2d 73-100 S C t 826).

III. THE FIRST AMENDMENT AND THE NEED FOR PRECISION

The Court, in *NAACP-LDEF et al.* v. *Campbell*, however notes, "it is clear the government must meet First Amendment strictures in its regulations concerning access to this channel of communications." The Court, further, sets the criterion by which First Amendment rights can

only be limited: "when the government restricts First Amendment activities, the restriction must at the outset be set forth with precision" (page 8, line 12).

The court, therefore, recognizes both a legitimate government interest in this area and the necessity that this be balanced against First Amendment rights. Constitutionally, all such limitations must be set forth with precision.

IV. DECISIONS FOR THE 1981-1982 CAMPAIGN

The one clear fact about the CFC is that its standards lack precision. Therefore, I do not find that the government interest, as represented in the current standards of the Manual, is drawn at present with enough precision to meet First Amendment protections.

One alternative is to discontinue the campaign. Yet, in a period of fiscal constraint in government, the survival of sources of private charity to compensate for what government cannot spend is an important consideration. The CFC is a major source of income for American charities. The charities it supports, for the most part, provide services which are essential for America's and the world's needy. This decision, however, should be evaluated again next year.

The ideal solution this year, assuming that the campaign should continue, is to revise the regulations to make them more in accord with the precision required by the First Amendment. I have come to the reluctant conclusion that it is too late to do so for this year's CFC. Such regulations would have an *ex post facto* unfairness and, for practical reasons, it is probably too late in the planning process to make the wholesale revisions which are necessary.

The only remaining alternative is to continue the CFC but to apply the Manual regulations liberally, to make access relatively easy. The government interest is protected by exercising some restrictions, while First Amendment considerations become paramount in the light of the vague standards. This is the course we have chosen for this campaign.

V. APPLICATIONS NOT APPROVED

Using the very liberal interpretation referred to above, only ten applications are not recommended to the CFC. All of these are rejected only for severe departures from the regulations. The following are not included because applications were not even completed: Interfaith Hunger Appeal, Japanese American Citizens League, and National Association to Aid Fat Americans. The Asthma and Allergy Foundation is not recommended because it does not require any financial reports at all of its subordinate units. The Meharry Medical College is not recommended because of inconsistencies found in its financial reporting to OPM; similar difficulties were encountered with the National Concilio and the Natural Resources Defense Council. The National Council on Aging and the National Association for the Deaf are turned down for their *extreme* lack of public support: the former raises only one percent of its revenue from the public directly and the latter only two percent. The Center for Science in the Public Interest is turned down because it prepares no annual report to the public.

VI. BORDERLINE CASES

Seven applications were denied by the Eligibility Committee on grounds that the submitting agencies were not health and welfare groups, but rather political or advocacy groups. There was also the difficulty which arose in last year's CFC decision regarding whether they provide direct services, as required by the Manual. This is the matter directly touched on the *NAACP Legal Defense and Education Fund, Inc., et al* v. *Campbell* case.

I find some merit in the argument that these are not agencies which fall under Executive Order 10927. There is also logic to the direct vs. indirect services distinction. The difficulty is that the Manual does not define either of these criteria with the specificity required by the Court. It is clear the Court has not excluded these as criteria, but has excluded these criteria as presently defined. The Court held: "what the Court has determined here—and all it has determined—is that the 'direct services' requirement, as presently employed, does not have the precision necessary

to comport with constitutional requirements" (page 8, line 12).

Nonetheless, since nothing has been done since the Court case to define these criteria more precisely, I conclude that these agencies must be allowed to participate in the present campaign. These questions, however, are among those that will be reviewed for the next campaign.

The second difficult decision involves Planned Parenthood-World Population (PP/WP). Serious procedural questions have been raised regarding the eligibility of this agency. (1) A question is raised whether the 12 percent of funds raised directly from the public is sufficient to represent the Manual Section 5.21 requirement for participation in the CFC based upon broad support from the general public. This low percentage raised from direct contributions does seem too low to demonstrate this support. Yet, I do not find the standards precise enough on this matter. (2) Questions were raised before the Eligibility Committee regarding whether this agency meets the Section 5.21 provision that "such services must be consistent with policies of the United States Government." Not all of the facts are clear here, but it is relevant to note that in a letter of April 13, 1981, Planned Parenthood-World Population stipulated that it does not purchase, nor permit its grantees to purchase, Depo-Provera as claimed in testimony before the Eligibility Committee. PP/WP also has stipulated that no funds "currently being used . . . provide abortion services in our international program." (3) Questions were also raised whether the agency meets the Section 5.24 criterion that "it has earned good will and acceptability throughout the United States." Evidence was presented showing material derogatory to one religious group. It should be noted, however, that the material was distributed by the Planned Parenthood Association in Chicago and not Planned Parenthood-World Population, the group under consideration here. (4) The Eligibility Committee declared that the accounting standards used by PP/WP are only "substantially" in accord with the standards in the Manual. This agency, however is not unique in failing fully to meet these standards. (5) Therefore, I find that Planned Parenthood-World

Population should not be excluded from the campaign, since the Manual standards lack First Amendment precision, and/or that the facts presented are in doubt.

The agencies covered by this Section, consequently, are given admission to this CFC campaign, as well as all other agencies which have submitted applications, other than those listed in Section V. above. The recognized campaigns and agencies are listed on the covering memorandum.

VII. SUMMARY

The general public naturally is concerned about the lack of precision in the standards of the current Manual, and the resulting looseness of eligibility criteria in the 1981-82 Combined Federal Campaign. As a partial protection of the "government interest," some very broad restrictions are applied in Section V. Yet, the general rule for the 1981-82 CFC, is that most agencies will be admitted to the CFC and that all admitted agencies will be eligible for designated funds.

For the 1982-83 campaign, the public may be assured that adequate standards will be promulgated, in appropriate regulatory format, and that the resulting eligibility criteria will be precise enough to respect both First Amendment rights and the "legitimate government interest."

/S/ Donald J. Devine
DONALD J. DEVINE
Director

DATE: JUNE 9, 1981

EXHIBIT C, RALSTON AFF.; C.A. NO. 83-

USO WORLD HEADQUARTERS
1146 19th St., N.W.,
Washington, D.C. 20036 (202) 862-0700

October 2, 1981

Hon. Donald J. Devine, Director
Office of Personnel Management
Washington, D.C. 20415

Dear Mr. Devine:

As chairperson of the National Service Agencies I am pleased to have this opportunity to submit NSA's recommendations for the proposed modifications of the Manual, pursuant to the conversation between you and your staff and a Committee of NSA Agencies on July 7, 1981. This letter will summarize the position of the NSA group. Enclosed is a detailed memorandum giving the background for our proposals and supporting arguments and information.

Our proposals are based on a number of principles:

First, any standards for the inclusion of organizations in the Combined Federal Campaign must comport with constitutional requirements. Thus, they must be clear and specific and give guidance to officials at whatever level who are making decisions with regard to a particular organization.

Second, they must be drafted in light of the overriding requirement of the First Amendment that an organization not be judged on the basis of the content of its appeal or the nature of its program.

Third, the standards must relate to the legitimate governmental interest in regulating the time, place, and manner of charitable appeals and to legitimate administrative concerns.

Fourth, the regulations must be politically neutral so that federal employees are free to exercise their own judgment as to what organizations deserve their support uncontrolled by any screening of programs that government officials may or may not believe are worthy.

Fifth, in accord with the Administration's principles governing all regulations, the Manual must be as straightforward and simple as possible in order to save the time and energy of all concerned, both staff of charitable organizations and the personnel administering the Combined Federal Campaign.

As a result of our experience with the campaign, particularly as it relates to applications to local CFC's, we believe the existing Manual meets virtually none of these above requirements. It is overly complex and overly regulatory. Its standards are vague and confused, thus resulting in arbitrary and diverse decisions at the local level. Its criteria favor some types of charitable organizations over others on grounds unrelated to any legitimate government interest. In general it results in the wholly unnecessary expenditure of a great deal of time, effort, and money that could better be directed towards effective fund raising.

We propose that the entire Manual be rewritten along the following lines. There should be *two* general categories of organizations, locally based and oriented agencies, and national/international agencies. Local (or state-wide) agenices will still be required to apply to local Federal Coordinating Groups and meet constitutionally appropriate criteria for inclusion in a particular locality. Thus, we have no quarrel with the general proposition that, for example, an organization that serves the San Francisco area only should not be on the list of agencies in the Chicago area, or vice versa.

The second category are those organizations whose programs are not oriented towards a particular locality, but rather are national in scope or have as their purpose providing charitable services abroad. With regard to such agencies it seems to us totally irrational to condition their inclusion in a local CFC on whether their services are carried out in particular localities. The nature of their programs is to benefit either American society as a whole or to direct the largesse of that society to poorer countries. Therefore, they should be able to appeal to all employees and military personnel of the federal government regardless of where they may reside or work.

The definition of international agencies is straightforward and should provide no particular problem. We suggest in the accompanying memorandum a definition of national agencies which would include within its scope both the national health agencies and the national service agencies. Basically, the term would include any agency whose purpose is to benefit a class of persons regardless of locality, or whose purpose is to attack a particular problem or issue that affects persons nation-wide or in a large area of the country. Both the "direct services" and the "substantial services" requirements are eliminated. They are too vague and undefinable, and they focus on the nature of an organization's program. The manual would require that any national/international agency which applies to OPM and meets these carefully drawn criteria will be admitted to the Combined Federal Campaign and will be listed in the brochures distributed by all local CFC's (unless the agency is already a participating agency in the local United Way). In this way agencies will be spared the burden of applying at both the national and local levels, and the local CFC's will be spared the burden of attempting to apply undefined criteria to many different agencies.

With regard to undesignated funds, we urge first that the category be eliminated and that all contributions be by designation. Failing that, it must be mandated that all groups will share in undesignated funds based on the percentage of designations they receive by locality. There are a number of possible forms this could take; for example, a federal employee could have the options of designating a particular agency, of designating local agencies or national/international agencies, or of not designating at all.

We also urge that contribution leaflets and pledge cards be standardized so that all federal employees receive the same basic information. Finally, we recommend that OPM adopt the recommendations of the General Accounting Office relating to the establishment of central receipt points for funds, requiring a "hands-off" policy by participating agencies, and regarding audits of funds.

In summary, our proposal would have the advantage of maintaining local autonomy where it is relevant, i.e., with

regard to the admission of local agencies, while ensuring uniformity and standardized decisions with regard to those agencies whose programs are not locally oriented. We would appreciate the opportunity of discussing our proposals with you and your staff as well as being informed of any proposals of other organizations or groups so that we may comment on them.

Thank you very much for your consideration of this matter.

Cordially,

/s/ Eugene J. Brennan
EUGENE J. BRENNAN
Chairperson
National Service Agencies

Enclosure

CC: Mr. Joseph S. Patti
Assistant to the Director

MEMORANDUM

October 1, 1981

TO: Hon. Donald Devine, Director
Office of Personnel Management

FROM: National Service Agencies

RE: Revisions in the Manual for Fundraising in the Federal Service.

Decisions of the Supreme Court have long made it abundantly clear that charitable solicitation is protected by the First Amendment. It is therefore subject only to reasonable regulations related to legitimate governmental interests such as the time, place, and manner of solicitation and prevention of fraud or unwarranted invasions of privacy. See, *Village of Schaumburg* v. *Citizens for A Better Environment*, 444 U.S. 620 (1980).*

Regulations may not be related to the content of an organization's appeal or the nature of its program. Thus, in *Village of Schaumburg* v. *Citizens for a Better Environment, supra*, the specific requirement involved, *i.e.*, a 25% limit on fund raising and administrative expenses, was struck down because it discriminated against certain types of charitable organizations as opposed to the more traditional kind. Further, limitations or regulations of charitable activities must, in common with all other limitations on First Amendment activities, be based on clearly defined criteria and rules to prevent the arbitrary exclusion of some groups and the favoring of others. *Heffron* v. *Int'l Soc. for Krishna Consc.*, ___ U.S. ___, 69 L.Ed.2d 298, 307 (1981).*

*In its most recent decision dealing with charitable solicitation the Supreme Court upheld time, place and manner regulations that were applied evenhandedly to all organizations, while making it clear that differences in treatment based on the nature of the organization or the content of its apeal were not permitted by the First Amendment. *Heffron* v. *Int'l Soc. for Krishna Consc.*, ___ U.S. ___, 69 L.Ed.2d 298, 306-07 (1981).

In two recent decisions these principles have been applied to the Combined Federal Campaign, and portions of the Manual have been held invalid as violative of the First Amendment. *National Black United Fund* v. *Campbell*, 494 F. Supp. 748 (D.D.C. 1980); *NAACP Legal Defense and Educational Fund, et al.* v. *Campbell*, 504 F. Supp. 1365 (D.D.C. 1981).* In *NAACP Legal Defense and Educational Fund* v. *Campbell*, Judge Gesell strongly urged that those responsible for the Combined Federal Campaign set about revising its provisions to bring it into full compliance with First Amendment requirements, so that legal challenges would not result in its destruction.

There is no question but that the Combined Federal Campaign is a worthy enterprise which should be continued with full vigor, and the NSA group members fully support its continuation. However, they are also united in their concern that it be structured in a way consistent with the Constitution and that it give federal employees the opportunity to select freely for themselves those types of charitable efforts that they believe worthy of support. Paternalism has no place in the Combined Federal Campaign. Federal em-

**Heffron* is worth quoting at some length since it highlights precisely what is wrong with the present Manual:

> A major criterion for a valid time, place, and manner restriction is that the restriction "may not be based upon either the content or subject matter of the speech".... [The rule] qualifies in this respect, since ... the Rule applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds.
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> * * *
>
> Nor does [the] Rule ... suffer from the more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority. The method of allocating space is a straightforward first-come, first-served system. The Rule is not open to the kind of arbitrary application that this Court has condemned as inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.

69 L.Ed. at 307.

*The United States has acquiesed in both decisions by declining to appeal either, and therefore is fully bound by them.

ployees are fully capable of making an informed choice between different types of charitable appeals and do not need government officials, however well meaning, to decide in the first instance which are "good" or "worthy" charities.

The basic problem with the rules and regulations governing the CFC as embodied in the present Manual is that they are based on the false assumption that there are some charities that are better than others, and that the government is qualified to decide which they are. The Manual is strongly biased in favor of what might be termed "traditional" charities which, while worthy in their aims and activities, do not have the only answer to the best way to assist those in need. Thus, the Manual suffers from precisely the same underlying defect as did the ordinance struck down in *Village of Schaumburg*. Its revision is essential, and any revisions must result in scrupulously avoiding any rules or restrictions which would favor or disfavor any charity based on preconceived motions as to what is a "good" charity.

As noted above, the courts have addressed themselves to particular parts of the Manual and have found them deficient. In the *NBUF* case the court struck down a number of provisions which inhibited new organizations with new orientations from coming into the CFC. In the *NAACPLDF-PRLDEF* case the court held that one of the crucial provisions in the manual, the so-called "direct services rule," was fatally flawed because of its vagueness and capacity for arbitrary application. As a result of these decisions a number of organizations were admitted for the first time into the CFC and placed in the National Service Agencies group. They were, however, also required to apply to each of more than 550 local CFC's.

Their admission at the local level was judged on whether they provided "substantial services" in the local community, a criterion as equally undefined as was the "direct services" rule, and one subject to abuse and arbitrary application. The experiences of NSA group members are both illustrative and instructive. A number of agencies applied to all of the local CFC's with extremely mixed results. In a significant number, agencies were rejected on the ground of local deadlines which have been arbitrarily set in total disregard of explicit guidance from OPM. A number of local

CFC's requested further information relating to what agencies did in their localities, sometimes telephonically, sometimes by letter. Some of their concerns were met by the guidance in OPM's CFC Memo No. 5. In particular, with a few exceptions, agencies ceased getting requests that there be a local phone number or contact person.

A number of local CFC's took the wholly reasonable view that once an NSA agency was admitted by OPM, it was automatically admitted in their locality. A number of others, when informed of an agency's program, either on a national basis or with regard to the particular regior., were satisfied.

A substantial number of locals, however, rejected organizations either out of hand without seeking further information, or after they had responded to their questions. Most rejections were on the ground that there was no evidence that agencies did anything at the local level, completely ignoring demonstrations that, for example, lawsuits had benefited all federal employees nationwide, and therefore necessarily benefited persons in their community. Others based their rejections on rules that either had been superseded by OPM's recent memos, were no longer part of the manual, or that were of their own invention. Some of the reasons were: (1) some other unnamed organization already provided similar services; (2) the application was not signed in the original; (3) local media had never heard of the agency; (4) the local United Way had never heard of it; (5) the agency was not registered with the state as authorized to conduct charitable solicitations (sometimes it was, sometimes it wasn't); (6) the agency was required to fill out a lengthy form (most refused to do so); (7) etc. Attached to this memo are representative letters both accepting and rejecting two of the NSA agencies. It is obvious from a reading of them that decisions are being made based on rules that are (1) non-existent; (2) arbitrary; (3) illegal; and (4) generally unconstitutional. *

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*The most outrageous turndown was from Charleston, South Carolina, which telephonically informed the NAACP Legal Defense Fund that it was decided to reject *all* NSA groups because their being on the list last year had resulted in donations going down.

The basic problem with the system as set up now lies in the requirement that nationally oriented organizations apply to individual Combined Federal Campaigns. This requirement is totally irrational and related to no legitimate government interest that is even remotely discernible. Clearly, a local CFC may rationally limit involvement of charitable organizations that are oriented towards another locality. Thus, we have no quarrel whatsoever with, for example, the Chicago CFC not admitting an agency whose services or programs are restricted to the San Francisco Bay area. This restriction makes no sense, however, with regard to national organizations, and indeed does not apply now to international service agencies.

We propose, therefore that there be two main categories of organizations. The first would consist of local groups (which probably should be defined to include groups that are state-wide). The second category would be national/international agencies, that is, those agencies which are not oriented to a particular locality but rather have programs dealing with a variety of issues that are larger in scope, both geographically and in terms of subject matter.

International agencies would include those organizations which conduct programs designed to benefit the needy in other countries, such as CARE, the Pearl S. Buck Foundation, et cetera. National agencies would include a variety of organizations whose purpose is to address a particular problem or issue that affects persons regardless of their locality, or whose purpose is to benefit a class of persons. Examples would be the American Cancer Society, whose purpose is to eradicate cancer whomever it might effect; civil rights organizations, whose purpose is to achieve equality and justice for particular segments of the society regardless of locality; resource agencies, such as the American Foundation for the Blind, whose purpose is to provide back-up assistance to local agencies dealing with the blind; agencies such as United Service Organizations, the United Seamen's Service, and the American Red Cross, whose purpose is to provide assistance and benefits to various groups.

The criteria for deciding the admissibility of agencies in the international/national category should be straightforward and clear, since their purpose is not to judge the nature of the program, but rather to determine whether an agency will be required to apply to local CFC's. Thus, the criteria will be oriented towards a procedural rather than a substantive question. Suggested criteria (which need not be exclusive) would be; is the organization's program directed towards persons in other countries; are the organizations' programs carried out outside the United States; do the programs have an orientation that extends beyond the limits of a single state; is the purpose of the organization to benefit a class of persons, *e.g.*, Blacks, Hispanics, women, et cetera, regardless of the particular geographical locality of the individuals involved; is the organization's program designed to address a health or economic problem affecting the population generally, such as cancer, blindness, heart disease, or unemployment. If these criteria are met, and if the organization is IRS approved, then the agency will be approved by OPM as an international/national agency and will appear in the campaign brochures of all CFC's, whether national or overseas.

The proposed revisions have a number of advantages. *First*, they are simple since they establish criteria readily administered at one level. It will no longer be necessary for national organization to apply to OPM and then to more than 550 local agencies, and local agencies will no longer have the burden of judging (or rejudging) whether a national organization should be admitted under vague criteria. *Second*, the manual would be constitutional since it would not involve the judging of an organization on the basis of the nature of its program, except with regard to a procedural matter related to the time, place and manner of solicitation. *Third*, the system is fair since it allows all *bona fide* charitable agencies equal access to federal employees, and allows federal employees to chose freely among a variety of different types of agencies. *This* CFC would relieve agencies of unnecessary and time consuming applications, would relieve local CFC's of an unwarranted

burden, and would relieve OPM of the necessity of defending an endless series of indefensible lawsuits.

Finally, the NSA agencies strongly urge that the category of undesignated funds be eliminated in its entirety. As presently constituted the system unfairly disadvantages organizations based on no rational or legitimate governmental interest. Again, federal employees are perfectly capable of deciding the manner in which they wish their dollars to be allocated. If the principle of undesignated funds is retained, the persent discretion for dividing them should be removed from local CFC's because it permits unwarranted and arbitrary decisions. The Manual should provide that an employee may designate any single agency, may designate any category of agencies, e.g., local, national, international, etc., or may simply give money to the CFC generally. The division of undesignated moneys would be based solely on the basis of that year's proportion of designated funds a group has received at the local level.

EXHIBIT D, RALSTON AFF.; C.A. No. 83-

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

October 22, 1981

TO: The Honorable David A. Stockman
Director
Office of Management and Budget

FROM: Donald J. Devine
Director

SUBJECT: Proposed New Executive Order for the Combined Federal Campaign

Attached is a proposed Executive Order, *Directing the Director of the United States Office of Personnel Management to Provide for the Conduct of Fund Raising Activities Within the Federal Establishment In Support of Voluntary Health and Welfare Organizations* (Attachment A). I am requesting that this proposed Executive Order be approved from the standpoint of the Administration's program. Because time for approval is short before we have to begin preparations for the 1982-83 Combined Federal Campaign, I have transmitted the proposed Executive Order and the attached material directly to the Attorney General for his consideration as to form and legality.

BACKGROUND

It has been long-standing policy of the Federal Government to cooperate with and assist voluntary health and welfare agencies in soliciting funds for worthy causes from Federal personnel.

At one time, the increasing number of fund drives began to create an intolerable administrative burden for Federal officials. They were beseiged by dozens of agencies seeking endorsements and the privilege of soliciting employees on the job. In addition, employees were confused by the multiplicity of appeals—as many as 10 to 20 a year in some departments.

After extensive study of the situation, a uniform program (now known as the Combined Federal Campaign) was established in 1956 to limit the number of campaigns and to insure true voluntary giving by Federal personnel. The program was originally monitored by the *President's Committee on Fund Raising Within the Federal Service.* The Committee was later abolished and its functions assigned to the Chairman, U.S. Civil Service Commission (now Director, Office of Personnel Management), by Executive Order 10927 of March 18, 1961. (Attachment B)

From its inception the Combined Federal Campaign was intended to be, and has been, limited by regulation to health and welfare organizations that also meet certain other prescribed eligibility criteria. The health and welfare limitation has clearly served the public interest; however, developing constitutional doctrine, as formulated by the Courts, makes the limitation highly vulnerable to legal challenge in that Executive Order 10927 does not explicitly direct such limitation. The only applicable direction the Executive Order contains is that:

> "* * *The Chairman of the Civil Service Commission (now, Director, Office of Personnel Management) shall make arrangements for such national voluntary health and welfare agencies and *such other national voluntary agencies as may be appropriate* to solicit funds from Federal employees and members of the armed forces at their places of employment or duty stations* * *" (emphasis supplied).

If the "health and welfare" limitation now imposed by regulation were to be struck down by the Courts as impermissibly restrictive of the language of Executive Order 10927, it could create an intolerable administrative burden on local Federal officials and severely affect the viability of the voluntary agencies participating in the Combined Federal Campaign that undertake to meet common human needs of the community in the areas of health and welfare. The demands upon such agencies already far exceed the resources available and will be even greater as Federal funds for some health and welfare programs are reduced or possibly eliminated in some program areas.

A further problem is created by the omission of any prescribed eligibility criteria in Executive Order 10927 other than as stated above. Some groups that have not been able to meet the eligibility standards set forth by the Office of the Director, Office of Personnel Management, in its regulations *(Manual on Fund Raising Within the Federal Service for Voluntary Health and Welfare Agencies)*, have attacked those standards in the Courts.

In NAACP Legal Defense and Education Fund v. *Campbell*, Civ. Action No. 80-1888 (D.D.C., filed January, 1981), the U.S. District Court refused to enforce the criterion that a charitable organization must provide "direct services" to people in order to qualify (rather than undertaking litigative advocacy) because the providing of "direct service" is not required by Executive Order 10927 and, as presently employed, lacks the necessary precision to guide the Director of the Office of Personnel Management in deciding what organizations should be approved for participation in the Combined Federal Campaign. (See Attachment C; CFC Memorandum 81-2.)

It should also be observed that in the *NAACP* case, the Court recognized that the imprecision of the existing eligibility criteria threatened the entire Federal employee contribution program. The Court noted that:

> "It behooves the government officials responsible for the program to re-examine the basic premises on which the program was established so that more acceptable standards can be developed which will assure continuation of the government's significant and useful support for worthy charitable solicitation."

Unless the deficiencies in Executive Order 10927 are corrected, the inevitable result will be mandatory admission to the Combined Federal Campaign of a multitude of organizations whose programs, whatever their benefit in other ways, are considered less critical to the national interest than those directed at common human needs in the areas of health and welfare. Furnishing Federal administrative effort and indirect support to obtain contributions for programs of lower priority would clearly conflict with the

thrust of the President's budget decisions to accord priority of Federal support to vital health and welfare programs.

PURPOSE OF THE PROPOSED EXECUTIVE ORDER

The purpose of the proposed Executive Order is to restate the legitimate government interest in establishing the Combined Federal Campaign; to prescribe necessary eligibility standards for participation in the Federal Campaign that are consistent with the legitimate government interest; and to set forth such standards with the precision necessary to meet constitutional requirements when the government restricts First Amendment activities. The proposed Executive Order would also revoke and replace Executive Order 10927 of March 18, 1961.

A summary of the salient features of the proposed Executive Order is as follows:

Section 1 sets forth the legitimate government interest in establishing the fund-raising program (Combined Federal Campaign) and for limiting participation therein to eligible voluntary health and welfare organizations. No similar provision is contained in Executive Order 10927.

Section 2 defines a number of terms used in the Executive Order. In Section 3 the term "eligible voluntary health and welfare organization" is defined. This Section specifies with necessary precision the standards that must be met by an organization to be approved for participation in the Combined Federal Campaign. No similar provision is contained in Executive Order 10927.

Section 4 charges the Director of the Office of Personnel Management to make arrangements for "eligible voluntary health and welfare organizatons" to solicit funds from Federal employees and members of the uniformed services at their places of employment or duty stations. A similar provision is contained in Executive Order 10927; however, the qualifying word "eligible" does not appear in the latter Order.

Section 5 provides that federated organizations that meet the eligibility criteria specified in the Order may participate in the Federal fund-raising program. No similar provision is contained in Executive Order 10927; however, such

participation is appropriate, has been permitted since the inception of the Combined Federal Campaign, and should be recognized in the Executive Order.

Section 6 authorizes the Director of the Office of Personnel Management, in making the arrangements required by the Order, to consult with interested persons and organizations and with the executive departments and agencies concerned. It requires that such arrangements permit true voluntary giving and provide for confidentiality of such gifts; requires designation of the period in which charitable solicitations may be conducted; and permits not more than *one* solicitation annually, except in the case of emergency, disaster appeals, or special local circumstances for which specific provision may be made by the Director of the Office of Personnel Management. A similar provision is contained in Executive Order 10927; however, the latter Order permits not more than *three* solicitations annually, apart from emergency or disaster appeals.

Section 7 requires that the form(s) used for solicitation of funds clearly identify the eligible agencies and provide a direct means to allocate funds to such agencies. It further requires that contributors be given prominent notice on such form(s) that a decision by a contributor not to allocate funds to specified agencies shall be deemed a decision to have such funds allocated by the principal combined fund organization. Section 7 further provides that the principal combined fund organization will manage, administer, and allocate undesignated funds for each local Combined Federal Campaign, subject to the direction and control of the Director of the Office of Personnel Management. Criteria to determine the principal combined fund organization are required to be specified by the Director of the Office of Personnel Management. No similar provisions are contained in Executive Order 10927.

Section 8 provides explicitly for participation in the Federal fundraising program of eligible international service agencies. No similar provision is contained in Executive Order 10927; however, such participation is appropriate, has been permitted since the inception of the Combined Fed-

eral Campaign, and should be recognized in the Executive Order.

Section 9 provides that the Order shall not apply to solicitations conducted by organizations composed of civilian employees or members of the uniformed services among their own members for organizational support or for benefit or welfare funds for their members. A similar provision is contained in Executive Order 10927.

Section 10 directs the Director of the Office of Personnel Management to prescribe such rules and regulations as may be necessary to implement the Executive Order. No similar provision is contained in Executive Order 10927; however, such authority is considered present by necessary implication.

Section 11 revokes Executive Order 10927 of March 18, 1961.

In further amplification of the purpose and intent of the proposed Executive Order, it should be noted that of the eligibility criteria set out in Section 3 of the proposed Order, most are substantially the same as those presently required in existing regulations of the Office of Personnel Management implementing Executive Order 10927.

Of the "new" eligibility criteria, one would provide for the first time a long-needed, precise definition of "health and welfare services" (Section 3(a)). Also provided for the first time is an objective standard for determining whether an agency provides "direct and substantial" services to individuals (Section 3(c)).

The other new eligibility criteria are that the agency be one that is "nonpolitical," as defined in the Order (Section 3(g)).

The requirement in Section 7(b) of the proposed Order—that at each local Combined Federal Campaign (there are some 545 such locations) a "principal combined fund organization" be designated to perform the functions specified would simplify the present unduly complex (but long-standing) arrangements for conduct of local campaigns, would substantially reduce the time required of the local Federal officials in effecting campaign arrangements, and would facilitate a more effective campaign within the poli-

cies and procedures to be prescribed in implementing regulations.

BUDGETARY IMPLICATIONS

There are no increased budgetary requirements associated with the proposed Executive Order. Some indirect economies may reasonably be anticipated in terms of reducing the time required of the local Federal officials to arrange for, and supervise, the conduct of local Combined Federal Campaigns in their respective areas.

TIMING

Applications for eligibility for the 1982-83 Campaigns originally were due December 1, 1981. We have delayed this to a last-date deadline of February 1, 1981.

CONCLUSION

As President Reagan said in his recent memorandum on the Combined Federal Campaign, "Through voluntary giving, we prove that individuals can do on their own without having to go through government channels" (Attachment D). This is particularly true at a time when the imperative of revitalizing the private sector of the economy necessitates some retrenchment in Federal expenditures. These cutbacks in social assistance programs can be partially, even if modestly, offset by the efforts of private, voluntary health and welfare organizations aided by the support derived through the Combined Federal Campaign. The proposed Executive Order is urgently required if the Combined Federal Campaign is to continue to fulfill its intended purpose.

EXECUTIVE ORDER

DIRECTING THE DIRECTOR OF THE UNITED STATES OFFICE OF PERSONNEL MANAGEMENT TO PROVIDE FOR THE CONDUCT OF FUND RAISING ACTIVITIES WITHIN THE FEDERAL ESTABLISHMENT IN SUPPORT OF VOLUNTARY HEALTH AND WELFARE ORGANIZATIONS

By the authority vested in me as President of the United States, it is ordered as follows:

Section 1.(a) I have determined that it is in the national interest for the Federal Government to support and facilitate fund-raising from Federal employees and members of the uniformed services on behalf of voluntary organizations that undertake programs to meet common human needs of the community in the areas of health and welfare.

(b) In order that such fund-raising not unduly interfere with the efficient operation of government; in order to avoid confusion to employees in, and inconvenience in the administration of, such fund-raising arising from the absence of limits defining those voluntary organizations eligible to participate; and in order to insure that the recipient organizations of the funds so raised are responsible in their uses of those monies; authority is hereby vested in the Director of the United States Office of Personnel Management to encourage, arrange for, conduct, and supervise such fund-raising, to be known as the Combined Federal Campaign.

Section 2. The following definitions shall apply to terms used in this Executive Order:

(a) "Director" shall mean the Director of the United States Office of Personnel Management, or his delegate.

(b) "Employee" shall mean any person employed by the Government of the United States or any branch, unit, or instrumentality thereof, including persons in the civil service and in the uniformed services.

(c) "Combined Federal Campaign" shall mean the fund-raising program established and administered by the Director pursuant to this Executive Order, and any subsidiary units of such program.

(d) "Community" shall mean a community that is defined either by generally-recognized geographic bounds or by its relationship to an isolated government installation.

(e) "Direct Contributions" shall mean gifts, in cash or in donated material, given by individuals and/or other non-governmental sources directly to the spending health and welfare organizations.

(f) "Indirect Contributions" shall mean gifts, in cash or in donated material, given to the spending health and welfare organization by another health and welfare organization that satisfies the criteria set forth in Section 3(b) of this Executive Order.

Section 3. As used in this Order, the term "eligible voluntary health and welfare organizations" shall mean an organization:

(a) that actively conducts health or welfare programs and provides services to individuals directed at one or more of the following common human needs within a community: service, research, and education in the health field; family and child care services; protective services for children and adults; services for children and adults in foster care; services related to management and maintenance of the home; day care services for adults; transportation services; information, referral, and counseling services; the preparation and delivery of meals; adoption services; emergency shelter care and relief services; safety services; neighborhood and community organization services; recreation services; social adjustment and rehabilitation services; health support services; or a combination of services enumerated in this Order designed to meet the special needs of specific groups, such as children and youth, the aged, the ill and infirm, and the physically handicapped;

(b) that is voluntary and broadly supported by the public, meaning that it is organized as a not-for-profit corporation or association under the laws of the United States, a state, a territory, or the District of Columbia; it is classified as tax-exempt under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended; and it has received in

the year immediately preceding any year in which it seeks to participate in the Combined Federal Campaign at least one-half (50 percent) of its revenues from non-governmental sources, or at least one-fifth (20 percent) of its revenues from direct and/or indirect contributions;

(c) that provides direct and substantial services to individuals residing in the geographic area in which personnel are solicited, which shall be evidenced by the expenditure for such services of at least one-third (33⅓ percent) of the funds received by the recipient organization from its solicitation of Federal personnel in that geographic area;

(d) that is directed by an active board of directors, a majority of whose members serve without compensation; that adopts and employs the *Standards of Accounting and Financial Reporting for Voluntary Health and Welfare Organizations;* that prepares and makes available to the general public an annual financial report prepared in accordance with the *Standards of Accounting and Financial Reporting for Voluntary Health and Welfare Organizations* and certified by an independent certified public accountant; that provides for an annual external audit by an independent certified public accountant;

(e) that can demonstrate to the Director, if its fundraising and administrative expense is in excess of 25 percent of total support and revenue, that its actual expense for those purposes is reasonable under all the circumstances in its case;

(f) that ensures that its publicity and promotional activities are based upon its actual program and operations, are truthful and nondeceptive, and include all material facts;

(g) that is non-political, meaning that it does not seek to influence the outcomes of elections or the determination of public policy by contributing to or endorsing any candidate for public office or any side of any question put to a referendum, by lobbying any legislative body, or by litigating public policy in any court on behalf of any person other than itself, or by contributing to any other organization which carries on any of the activities proscribed in this subsection;

(h) that files with the Director such special reports as the Director, in his discretion, may require in implementing this Order.

Section 4. In establishing the Combined Federal Campaign, the Director shall make arrangements for eligible voluntary health and welfare organizations to solicit funds from Federal employees and members of the uniformed services of the United States at their places of employment or duty stations. A Combined Federal Campaign at the place of business serves the government interest of effective operation of government installations by limiting the number and manner of solicitations of government employees.

Section 5. Federated, non-sectarian, non-political charitable organizations within a community whose participating members are health and welfare agencies that meet the eligibility criteria specified in Section 3 of this Executive Order and that normally solicit funds as such federation from the general public shall be eligible under this Order to solicit funds from Federal personnel on behalf of their participating agencies, subject to such rules and regulations as the Director may prescribe.

Section 6. In making the arrangements required by section 1 of this Order, the Director is authorized to consult with appropriate interested persons and organizations and with the executive departments and agencies concerned. Such arrangements shall:

(a) Permit true voluntary giving and reserve to the individual contributor the option of disclosing his gift or keeping it confidential;

(b) Designate the times in which such charitable solicitations may be conducted;

(c) Provide for not more than one solicitation annually, except in the case of emergency, disaster appeals, or special local circumstances for which specific provision may be made by the Director.

Section 7. (a) The form(s) used for solicitation of funds shall clearly specify the eligible agencies and provide a direct means to allocate funds to such agencies. Potential contributors shall be given prominent notice on such form(s)

that a decision by a contributor not to allocate funds to specified agencies shall be deemed a decision to have such funds allocated by the principal combined fund organizations.

(b) A principal combined fund organization shall manage, administer, and allocate undesignated funds for each local Combined Federal Campaign, subject to the direction and control of the Director. The Director shall specify criteria to determine the principal combined fund organization in each combined fund drive area.

Section 8. International agencies that provide health or welfare services overseas, which otherwise meet the eligibility criteria specified in this Executive Order except for Section 3(c), and whose programs and services are consistent with the policies of the United States Government, shall be eligible under this Order to solicit funds from Federal personnel, subject to such rules and regulations as the Director may prescribe.

Section 9. This Executive Order shall not apply to solicitations conducted by organizations composed of civilian employees or members of the uniformed services among their own members for organizational support or for benefit or welfare funds for their members. Such solicitations shall be conducted under policies and procedures approved by the head of the department or agency concerned.

Section 10. The Director shall prescribe such rules and regulations as may be necessary to implement this Order.

Section 11. Executive Order No. 10927 of March 18, 1961, is hereby revoked.

THE WHITE HOUSE 1981

THE WHITE HOUSE
WASHINGTON

July 2, 1981

MEMORANDUM FOR ALL FEDERAL EMPLOYEES AND MILITARY PERSONNEL

We each have the opportunity to show our concern for those in need through the Combined Federal Campaign. It combines the annual fundraising efforts of the United Way, the National Health Agencies, the International Service Agencies, the National Service Agencies, local non-federated voluntary agencies and the American Red Cross.

Through voluntary giving, we prove what individuals can do on their own without having to go through government channels. We have the opportunity to provide services and programs for our neighbors and countrymen without making them dependent on government. The CFC also makes it possible to help those in faraway lands, extending a helping hand to friends around the world. We can help relieve pain and problems now and fund research to keep them out of our future.

In America, we have traditionally accepted the responsibility of voluntary giving for good causes. The values that cause us to care for our neighbors, our countrymen and people around the world are the values that make us great.

Federal Employees and military personnel have a proud record of generosity and concern for others. I am confident that record will continue this year. While the amount you give is a personal, voluntary decision, I hope that each of you will join me in supporting the Combined Federal Campaign.

RONALD REAGAN

EXHIBIT E, RALSTON AFF.; C.A. NO. 83-

For immediate release
Friday, July 2, 1982

Contact:
Patrick Korten

OPM ISSUES FINAL RULES OFFERING WIDE CHOICE, FULL DESIGNATION FOR COMBINED FEDERAL CAMPAIGN

(WASHINGTON, D.C.)—Final regulations governing the Combined Federal Campaign, the government's charity drive for private voluntary organizations, today were submitted for publication in the Federal Register by the U.S. Office of Personnel Management. OPM Director Donald J. Devine noted that a number of changes were made, following careful consideration of more than 6,500 comments which were submitted following the publication of proposed regulations on May 11, 1982. Devine said that the final version of the new rules "create the most equitable system for all parties concerned: Federal employees and members of the Armed Forces, the charities, the recipients of the charities' services, and the general public."

The OPM Director noted that in addition to considering the thousands of written comments which were received, he personally met with representatives from all of the national voluntary groups in the campaign and 15 charitable agencies, in some cases more than once. Devine said that most of those submitting comments (70%) were supportive of the proposed new regulations, with another 7% supporting them but with specific suggestions for modifications.

The regulations establish a framework in which Federal employees will have a wide choice of charitable agencies to which they may contribute, and will be encouraged to earmark their contributions for specific charities, rather than make an undesignated gift which is then distributed among many participating organizations.

Director Devine called the final rules "fair, precise and objective," and said they would "greatly enhance a charity drive in which Federal employees have shown themselves to be extraordinarily generous, in contributing millions of

dollars to charities serving the needy throughout the United States and all over the world."

Devine said that the new regulations "will result in a Campaign which offers Federal employees a wide choice of charities to select, and will encourage them to make their contributions in a very personal way, by carefully selecting the individual charities they'd like to benefit."

With regard to objections raised by some respondents, Devine noted that most of them centered on four issues: designation of a local Principal Combined Fund Organization (PCFO), distribution of undesignated contributions, the purported difficulty that some charities serving minorities and women would have in qualifying for participation, and the end of participation of local unaffiliated charities after the fall 1982 campaign.

The final CFC regulations reflect OPM's belief that the designation of local Principal Combined Fund Organizations will strengthen the administration, "because of the expertise of these already-existing federated fund-raising organizations." In addition, Devine said that the arrangement will reduce what is now a substantial administrative cost to the government. However, he added that some specific changes have been made in the rules governing PCFOs, based on the comments received, and involve strengthening the direction and control over PCFOs by local Federal Coordinating Committees.

Director Devine noted that "the distribution of undesignated contributions has been one of the major sources of controversy with the CFC since its inception." Over the years, various methods and formulas have been used in attempts to insure their equitable distribution. None have stilled the controversy over the methods or forestalled legal action to overturn them."

The new regulations, Devine pointed out, place the responsibility for deciding where the funds will go with the employee-contributor. Employees are strongly encouraged to make a specific designation, and are clearly notified that "a decision not to do so is a rational choice to have the contributions allocated by the PCFO—an organization made up of representatives of his or her local community, experi-

enced in evaluating needs and allocating scarce charitable contributions."

Another matter concerning undesignated funds is clarified in the final regulations: these funds may be distributed to international service and other agencies, and are not restricted to organizations that serve localities only. Devine noted that this was the intention throughout, and that the clarifying language was inserted in response to concerns that this be made explicit.

The third general objection to the proposed regulations, that the eligibility of legal defense, minority and women's organizations was in doubt, resulted in changes in the original language. "OPM is persuaded that some of the earlier criteria were overly restrictive and has modified both the general eligibility requirements and the direct and substantial presence criterion to meet most of the germane objections," Devine said.

The OPM Director made clear that the agency would retain the earlier decision that local unaffiliated charities would be ineligible for participation on their own after the fall, 1982 campaign. He noted, however, that the final regulations "permit local unaffiliated organizations one year of grace to participate in the CFC before they must join other national federated fund-raising organizations to be eligible for participation in the future. The regulations, in addition, provide the means for the eventual participation of these local nonfederated agencies as part of national federations."

Devine said that a number of other comments and suggestions were incorporated in the final regulations, including many which made the rules clearer, or which solved technical problems. He said a decision was also made to modify the alphabetical listing of organizations in the CFC literature to allow agencies to be listed according to categories of service, each identified by its group affiliation, and with federated groups enumerated separately at the end of the listing.

Director Devine said that OPM had concluded that it was vital to proceed with the campaign under the new rules immediately, rather than delay implementation as some had suggested. "The changes are important enough to require

implementation at this time," Devine declared. "They will ensure a fairer, more rationally conducted campaign this year, and will give us the benefit of the many improvements in the CFC which are embodied in the new rules.

"I know that these regulations will ensure a more efficient, free, and open charitable fund raising drive which will help to enhance the President's drive to restore the spirit of voluntarism in America," Devine concluded. "I look forward to having the best year ever for charitable giving in the Federal government, and a sign that Federal employees believe strongly in the principal of individual voluntary help to those in need."

EXHIBIT F, RALSTON AFF.; C.A. NO. 83-

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND
AEROSPACE WORKERS
MACHINISTS BUILDING, 1300 CONNECTICUT AVENUE,
WASHINGTON, D.C. 20036
(Area Code 202—857-5200)

GL-14 United Way

August 18, 1982

TO ALL GRAND LODGE REPRESENTATIVES, SPECIAL REPRESENTATIVES, GRAND LODGE AUDITORS, BUSINESS REPRESENTATIVES, RAILROAD AND AIRLINE GENERAL CHAIRMEN, DISTRICT AND LOCAL LODGE ORGANIZERS, PRESIDENTS AND RECORDING SECRETARIES OF LOCAL LODGES AND PRESIDENTS AND SECRETARY-TREASURERS OF DISTRICT LODGES IN THE UNITED STATES

Dear Brothers and Sisters:

It is with great regret that I am urging all IAM members to withhold further support and to rescind all existing check-offs for the United Way Campaign this year.

We are not opposed to the many charitable causes which our members have always supported with great generosity and compassion in the past. We have always been known as a union with a heart. We will continue to support worthy causes. But as long as Reagan appointees pervert the fundamental purposes of the United Way, it no longer deserves our support. By making the National Right-to-Work (for less) Legal Defense and Education Foundation eligible to share in funds raised by the United Way Campaign in federal agencies, Reagan's appointees have perverted every accepted concept of charity and compassion.

So that you will understand exactly why this is such an insulting slap in the face to every working man and woman in America, let me tell you what the Legal Defense Foundation is and how it literally seeks to cut your throat.

This is a labor-hating, union-busting conspiracy primarily backed by big business and subsidized by corporations. It exists for the sole purpose of financing, managing and participating in lawsuits seeking to limit or destroy union security agreements and otherwise weaken unions. It sets union members against union members. It tries to weaken and bankrupt unions from within by subsidizing endless lawsuits, litigation and appeals piled upon appeals. Such a foundation has no more right to be included in a United Way Campaign than Jack the Ripper had to be invited to an afternoon tea party for maiden ladies.

Let me assure you we are not lightly or willingly withdrawing our support from the United Way. We realize that in years past a large part of the United Way's support has come from union members. To avoid this drastic action we asked national officials of the United Way to lodge a strong protest against this foul perversion of a charitable enterprise. They have refused to respond. So now let them get their funds from the labor-haters and the union-baiters. Instead of contributing to those who seek to destroy us I suggest that we should give directly to causes that we have traditionally supported and that have supported us. This year make your charitable contribution, including your check-off, to Guiding Eyes, Inc. and/or the City of Hope.

Fraternally yours,

/s/ William W. Winpisinger
WILLIAM W. WINPISINGER
International President

W/bo

cc: Executive Council
Kourpias
Holt

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS
MACHINISTS BUILDING, 1300 CONNECTICUT AVENUE
WASHINGTON, D.C. 20035

Office of the
International President

Area Code 202
857-5200

GL-14 United Way

August 17, 1982

Mr. Jordan L. Biscardo, Director
Department of Labor Participation
United Way of America
801 North Fairfax Street
Alexandria, Virginia 22314

Dear Mr. Biscardo:

This is to let you know that I am hereby withdrawing my June 2 letter endorsing the United Way Campaign to all union members. As long as the fraudulent, labor-hating, union-busting conspiracy known as the National Right-to-Work Legal Defense and Education Foundation is included among those eligible to receive funds from the United Way Campaign, unions would be insane to urge participation by union members. I have notified all our IAM lodges of this decision as well as the reasons for it. I have also asked our members to rescind any payroll check-offs they may have made for the United Way.

I regret having to make this decision but regret even more the failure of National United Way officials to protest the decision by Reagan appointees to make the Legal Defense Foundation eligible to share in funds raised by the United Way Campaign in federal agencies.

Sincerely,

WILLIAM W. WINPISINGER
International President

W/bo

cc: Executive Council
Holt
Kourpias

EXHIBIT G, RALSTON AFF.; CA. NO. 83-

AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000

August 23, 1982

PRINCIPAL OFFICERS OF ALL AFL-CIO
STATE AND LOCAL CENTRAL BODIES

Dear Trade Unionist:

We are advised that some central labor council officers have been approached on the question of boycotting this years United Way campaign. This idea was prompted by a recent action to admit the National Right to Work Legal Defense Foundation to the list of agencies eligible to receive charitable contributions from federal employees. The issue is confined to federal employees.

We have been assured by the national officers of the United Way that no undesignated funds will go to this organization.

AFL-CIO policy on this matter was unanimously adopted on August 4, 1982 by the Executive Council in New York.

We have every expectation that this policy will be strictly adhered to by all AFL-CIO state and local councils.

All attempts to offer local resolutions at official council meetings contrary to the national policy should be deemed out of order.

I have enclosed a copy of the Executive Council statement for your information.

I appreciate your cooperation.

Sincerely and fraternally,

/s/ Walter G. Davis
WALTER G. DAVIS
Director
Department of Community Services

WGD:jy
Enclosure

ATTACHMENT B

STATEMENT BY THE AFL-CIO EXECUTIVE COUNCIL ON COMBINED FEDERAL CAMPAIGN

August 4, 1982
New York, New York

The Reagan Administration has granted yet another opportunity to the far right wing to enrich itself, this time at the expense of federal and postal employees and the needy.

The government's Combined Federal Campaign (CFC) is a program by which federal and postal employees make contributions to help the poor, the sick and the oppressed. On July 23, the CFC National Eligibility Committee voted 6-2—the two federal and postal employee representatives dissenting—to designate the National Right to Work Legal Defense Foundation as a "national service agency" that may participate in the federal fund raising campaign. This totally perverts the concept of charity.

Reaganomics has bloated the ranks of the unemployed and of those living in poverty while starving the social sector. As a result, the resources of agencies that minister to those who cannot provide for themselves are strained to the limits. These agencies and those they serve are in desperate need of the sustaining funds provided by the CFC. At the same time, the administration's actions against federal and postal employees—including RIFs, pay caps, furloughs and increased health plan contributions—make it increasingly difficult for these employees to find the money to make CFC contributions.

The decision of the CFC Eligibility Committee has a particular irony, since the stated purpose of the Right to Work Foundation is to oppose the union shop and the agency shop. Federal employees are not even permitted to bargain for, much less to obtain, these equitable means of spreading the costs of union representation among all those whom the union represents.

The AFL-CIO, together with its departments and its affiliated national and international unions, will make every effort to insure that federal and postal union members are

fully informed on the National Right to Work Committee Legal Defense Fund's goals and why it is neither a legitimate charity nor worthy of support. The AFL-CIO will strongly urge all federal and postal union members not to designate the National Right to Work Committee Legal Defense Fund as the recipient of any of their CFC contributions. Instead, the Federation urges members and all federal and postal employees to designate the agency or agencies that meet their definition of a true charity.

The AFL-CIO is confident that union members are willing to do their share to help this year's CFC drive meet its humanitarian goals but we believe that the decision to include the Right to Work Foundation in the Combined Federal Campaign cannot help but impair the enthusiasm with which trade union members respond to CFC solicitations. The inclusion of the Right to Work Foundation which was done administratively is an affront to all union members, and we urge administrative reconsideration and reversal of this decision.

Under CFC's rules, it is highly probable that the Right to Work Foundation will receive only any monies federal and postal employees specifically designate as contributions to that group, and toward that end, we intend to continue our efforts to insure that none of the local CFC's undesignated funds go to the Right to Work Foundation. The United Way, whose affiliates serve as the combined fund organizations throughout the country, has advised the AFL-CIO that its affiliates will distribute undesignated funds only to those agencies that have historically received such funds and not to groups such as the Right to Work Foundation.

The AFL-CIO and its affiliates representing federal employees, intend to study the structure and conduct of the Combined Federal Campaign and to examine the question of whether the current structure best serves the needs of the nation's voluntary agencies and the desires of federal and postal employees to support deserving charities.

EXHIBIT H, RALSTON AFF.; C.A. NO. 83-

RESOLUTION
REQUESTING PRESIDENT REAGAN TO AMEND E.O. 12353 GOVERNING COMBINED FEDERAL CAMPAIGN

WHEREAS, the Federal Government, in an effort to help meet basic human-care needs, has traditionally limited eligibility for the Combined Federal Campaign to charitable agencies providing direct health and welfare services to individuals and families, including health research; and

WHEREAS, Executive Order 12353 issued by President Reagan on March 23, 1982, has been interpreted and applied by Federal officials to extend eligibility for the Combined Federal Campaign to organizations beyond those providing direct health and welfare services to individuals and families, including health research; and

WHEREAS, this change in basic concept has aroused considerable controversy and threatens to diminish substantially the necessary broad base of financial support for the Combined Federal Campaign and the essential services of the health and welfare agencies participating therein; now, therefore, be it

RESOLVED, that United Way of America hereby reaffirms its support for limiting eligibility for the Combined Federal Campaign to charitable agencies providing direct, human-care services in the fields of health and welfare, including health research; and respectfully urges President Reagan to clarify and amend Executive Order 12353 to reflect such limitation.

Approved and Adopted by the Executive Committee, Board of Governors, United Way of America, September 8, 1982, Alexandria, Virginia.

September 15, 1982

The President of the United States
The White House
Washington, DC 20500

Dear Mr. President:

The Board of Governors of United Way of America, acting through its Executive Committee, has adopted the enclosed Resolution respectfully requesting Presidential action to amend Executive Order 12353 to limit eligibility for the Combined Federal Campaign to charitable agencies providing direct, human-care services in the fields of health and welfare, including health research.

When Executive Order 12353, restructuring the Combined Federal Campaign, was issued on March 23, 1982, there were high hopes in your Administration that it would mark the beginning of a new era of cooperative effort and support for the program's charitable purposes. Certainly, those hopes were shared by the some twenty million dedicated volunteers in United Way organizations across the nation.

Unfortunately, the Executive Order and the implementing regulations issued by the Director, U.S. Office of Personnel Management, have had an opposite, and I am sure, unintended effect.

We now find that the Combined Federal Campaign has become a source of intense controversy because of admission to the campaign of organizations whose principal purpose is other than the providing of direct human-care services and health research to persons and families in need of such services.

Illustrative of the controversy is that organized labor, because of the admission to the campaign of the National Right To Work Legal Defense Foundation, now regards the campaign as having departed from its original charitable purpose of support for human-care services. As a result, some unions with hundreds of thousands of members, including the National Association of Letter Carriers, have taken the position that the Combined Federal Campaign is

no longer deserving of employee support and have directed a boycott of the campaign.

The implications of these actions by organized labor can and do extend beyond the Combined Federal Campaign. Until now, in the cause of charity, leaders of government industry, and labor have been able to put aside any difference between them on other matters. They have come together at the workplace in a social compact to assist the less fortunate in our society through support of charitable endeavors such as the Combined Federal Campaign as well as the annual nationwide United Way campaign. To jeopardize that compact appears clearly to run contrary to the national interest and to the goals of your Administration.

Mr. President, on behalf of the more than 37,000 charitable health and welfare agencies that are participating members of United Way, we urge favorable consideration and appropriate action to clarify and amend Executive Order 12353.

Sincerely,

/s/ Donald V. Seibert
DONALD V. SEIBERT
Chairman, Board of Governors
United Way of America

DVS:dk
cc: William Aramony

EXHIBIT I; RALSTON AFF.; C.A. NO. 83-

LEGAL DEFENSE FUND
NAACP Legal Defense and Educational Fund, Inc.
10 Columbus Circle, New York, N.Y. 10019 (212) 586-8397
January 11, 1983

The Honorable Ronald Reagan
President of the
United States
The White House
Washington, D.C. 20500.

Dear Mr. President:

The purpose of this letter is to express the concern of the NAACP Legal Defense and Educational Fund, Inc. over reports that the existing Executive Order governing the Combined Federal Campaign may be changed so as to eliminate organizations such as ours from participation in the CFC. We are strongly opposed to any such modification of the existing Executive Order or regulations since we are firm in our belief that federal employees should be given the broadest possible choice between organizations to which they may wish to donate. We believe any restrictions such as those proposed by the United Way or others, would violate both the principle of free open competition and your expressed hope that individual citizens will, through charitable donations, provide services which the government can no longer afford.

It is our understanding that the alleged reason for a more restricted Combined Federal Campaign is that the inclusion of legal defense organizations has resulted in "controversy" and, therefore, to a lower level of giving by federal employees. The facts simply do not support such a claim. Attached is a letter we have just received from the Greater Milwaukee 1982 Combined Federal Campaign in which the coordinator notes with pride that this past campaign surpassed both this year's goal (by more than $60,000), and the prior year's record collection. This was despite the fact that 1,000 fewer federal employees participated. Similarly, pledges to our organization are running significantly ahead of those for the 1981 C.F.C.

We have noted that some of the proponents of restrictive regulations have argued, in support of their position, that fewer federal employees have contributed this year. However, it is to be expected that a smaller *number* of federal employees will give in light of the declining federal work force. What is of great significance is that the *level* of contributions is up. According to Dr. Donald Devine, at a meeting in December at which members of our staff were present, giving is up 7% compared to last year. We believe that the higher rate of giving is the direct result of a greater range of organizations being included in the CFC. A number of studies have confirmed that when employees are given a broad choice, contributions increase and no organization suffers.

Further, the notion that there is some difference between "traditional" charities and "advocacy" organizations, and that only the former category deserves the support of federal employees, is indefensible. The Legal Defense Fund has been recognized by the Internal Revenue Service as a bona-fide charity for more than 40 years. As a result of our work hundreds of thousands of minority employees have received ten's of millions of dollars in backpay and other employment benefits. Our litigation has resulted in new hospitals being constructed, prison conditions being improved, decent housing provided, improvements in education, and other tangible benefits to many persons. Thus, the notion that organizations such as ours are not providing immediate and meaningful help to persons long deprived because of discrimination is simply untrue.

The final, and perhaps most important consideration, is that any change in the Executive Order which would exclude certain organizations because of their alleged "controversial" nature would be flatly unconstitutional. The Supreme Court of the United States, in an unbroken series of decisions over a period of 45 years, has held over and over again that charitable solicitation is protected by the First Amendment.* It is, therefore, subject to only the most

*E.g., *Lovell* v. *Griffin*, 303 U.S. 444 (1938); *Village of Schaumburg* v. *Citizens for A Better Environment*, 444 U.S. 620 (1980); *Heffron* v. *Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

narrow and limited regulations that are related to a compelling governmental interest. The Court has also held many times that alleged or perceived opposition to an organization's goals or programs cannot be the basis for regulating or denying such an organization free speech opportunities.

These decisions have been applied by the courts to the Combined Federal Campaign; indeed, it was as the result of such a case that the Legal Defense Fund has been able to participate.** That decision did not simply hold that organizations such as ours must be allowed to participate because their exclusion was not authorized by the existing Executive Order. To the contrary, the decision is founded on the First Amendment, and is based on the proposition that as long as there is a Combined Federal Campaign organizations cannot be included or excluded because of the nature of their programs.

We urge therefore that you resist the requests of a few to change the Executive Order. It would be most inappropriate to have federal bureaucrats impose their beliefs on government employees as to what constitutes valid or worthy charities. We believe that they are fully competent to decide such questions for themselves, and we are confident that you share our faith in the good judgment of the millions of men and women who are employed by the United States and serve in its Armed Forces.

Very truly yours,

/s/ Jack Greenberg

JACK GREENBERG
Director-Counsel

JG/gj
Enclosures

**NAACP Legal Defense and Educational Fund, Inc.* v. *Campbell*, 504 F. Supp. 1365 (D.D.C. 1981).

DEPARTMENT OF THE AIR FORCE
Headquarters 440th Combat Support Group (AFRES)
Gen Billy Mitchell Fld. 300E College Ave. Milwaukee WI 53207

Reply to Attn of: 440 CSG/DPM 5 Jan 1983
Subject: The Greater Milwaukee 1982 Combined Federal Campaign

To: NAACP Legal Defense and Educational Fund, Inc
10 Columbus Circle, Suite 2030
New York NY 10019

1. The 1982-83 CFC Committee of Greater Milwaukee has completed its 1982 campaign. I am pleased to inform you that we collected over $239,000.00. We not only surpassed our goal by more than sixty thousand, but surpassed last year's record collection with approximately one thousand less federal employees participating.

2. I've enclosed a copy of your agencies thirty word statement as used within our 1982 campaign. This may be used for your general reference. The agency that will oversee next year's campaign, here in the Milwaukee Area will be:

Social Security Administration
9401 Beloit Road
Milwaukee WI 53227

Please contact that office should any questions develope about that particular years campaign.

3. For your own information the United Way of Greater Milwaukee was selected as our "PCFO". They may be reached at the following address or phone:

United Way of Greater Milwaukee
606 East Wisconsin Avenue
Milwaukee WI 53202
Phone: (414) 271-0738

/s/ Franklyn E. Senft

FRANKLYN E. SENFT,
Major, USAFR CFC Coordinator

1 Atch
Agency Statement

CONTRIBUTOR PROFILE 1982-83

Please complete the following questionnaire to aid us in the administration of this year's National Service Agencies Campaign.

DATE March 2, 1983

GENERAL

Legal Name of Organization Combined Federal Campaign of the National Capital Area (PCFO- United Way of N.C.A.)

Contact Person Bill Schaeffler Title Director, CFC

Address 95 M Street, S.W., Washington, D.C. Zip 20024

Phone (202) 488-2075

Authorized Signature [signature]

PLEDGE INFORMATION

Total amount pledged $ $1,106,781.82 gross designations**

*Estimate of ~~prospect research~~ fund raising expenses $ $76,000 total CFC expenses***

*Estimate of NSA's share of expenses $ 44,270 - NSA share

Agency Designations
(See next page for names of agencies)

***per PCFO budget approved by Federal Coordinating Comm. (PERCENTAGE)

** We anticipate a loss on pledges causing an overall shrinkage of approximately 6½%. Therefore, we anticipate a payment of approximately $1,034,8

1. AFB	2.2900%	15. USO		29. NCPCA	3.8134
2. ASHA		16. CAS	0.5694	30. NII	0.3279
3. FEW	1.1257	17. CDF	4.7585	31. NRL	2.8210
4. ILRC	0.7599	18. CFI		32. NRW	2.6074
5. MA		19. CLD	1.0775	33. PLF	0.9366
6. NAACP/LDF	3.4924	20. CLF	0.1506	34. PP	18.0254
7. NAACP/SCF	2.8409	21. CSPI	0.4140	35. SO	
8. NBUF		22. LCCR	1.9107	36. UNCF	20.3490
9. NOW	2.9000	23. MLK	1.0607	37. USOC	3.0189
10. NRPA	0.3016	24. NAS	1.8308	38. VVAF	7.0623
11. NARF	1.1245	25. NBMC	0.5599	39. WS	3.3977
12. NRDC	1.1101	26. NCAI	1.1836	40. SCLDF	5.1192
13. PRLDF	0.3858	27. NCLC	0.1566	41. NPCA	1.5917
14. USS		28. NCNW	0.9263	TOTAL	100.0000%

Designations to NSA Federation to be shared among the Natl Serv Agencies:
NOTE: Be certain that the sum of the above percentages equals 100%.

$4,491.2
(gross des

*Please provide a statement detailing each expense.

BEST AVAILABLE COPY

Ex. K. Ralston Aff.; C.A. No. 83-

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
Washington D.C. 20415
February 2, 1983

MEMORANDUM FOR: Craig L. Fuller
Assistant To The President
For Cabinet Affairs

FROM: Donald J. Devine
Director
Office of Personnel Management

SUBJECT: NEW EXECUTIVE ORDER
FOR THE COMBINED FEDERAL
CAMPAIGN

I. INTRODUCTION

Pursuant to the direction given by the President at today's meeting of the Cabinet, I transmit herewith a draft of a new Executive Order for the Combined Federal Campaign. With the exception of very minor changes requested this afternoon by the Attorney General, this draft Executive Order is precisely in the form in which it was presented to the President. It would amend Executive Order 12353 (March 23, 1982) by limiting the Combined Federal Campaign (CFC) to health and welfare charities, thereby excluding, among others, advocacy groups and tax-exempt philanthropies that do not provide charitable health and welfare services. Preparations for the 1983-1984 CFC must soon begin; some time will be required to propose regulations implementing this new Order, giving notice thereof, receiving and considering comments thereon, and promulgating them. The time for approval of this Order is therefore short. Accordingly, pursuant to the instructions given to my General Counsel at your behest by the Associate Counsel to the President, I am directing this memorandum and its attachment to you and am simultaneously transmitting a copy hereof to the Attorney General so that he may expedite his consideration of its form and legality.

II. BACKGROUND

The CFC was initiated by President Kennedy in 1961 in order to control and simplify the process of charitable solicitation in the Federal workplace. *See* Executive Order No. 10927 (March 18, 1961). In the years prior to the implementation of the 1961 Executive Order, a growing number of charities had conducted separate fund drives for Federal workers, thereby creating an increasingly chaotic situation in Federal offices. In response to this problem, the 1961 Executive Order established a unified annual campaign for all charitable organizations. The 1961 Executive Order limited intrusions into the Federal workplace, and it contained certain requirements to ensure that contributions would be voluntary and confidential.

The CFC is conducted annually by the Federal government. Responsibility for its management was confided by President Kennedy in the Civil Service Commission. That responsibility today rests with the Office of Personnel Management (OPM). Federal employees are solicited for contributions to the CFC in meetings, by written materials printed by the Government, and by individual "key workers" who are Federal employees in each office. Employees may contribute in one lump sum or they may have a certain amount withheld from each paycheck. Employees also have the option of contributing to a general fund or designating specific organizations to receive their gifts. Donations to the general fund are distributed by a local community umbrella charity, such as the United Way. Employees may designate recipients of their gifts from a list of eligible organizations, which sets forth each organization's name and a general description of its purpose.

Eligibility for participation in the CFC was limited by the original Executive Order to "such national voluntary health and welfare agencies *and such other national voluntary agencies as may be appropriate.*" (Emphasis added.) In practice, participation was limited to traditional health and welfare charities that did not advocate, either through lobbying or litigation, a particular political position concerning public issues. These limitations were implemented

through regulations in a manual published by OPM concerning fund raising within the Federal Government. The manual included a provision that stated:

> Only non-profit, tax exempt charitable organizations supported by voluntary contributions from the general public and providing direct services to persons in the fields of health and welfare service are eligible for approval.

OPM interpreted the requirement that agencies provide "direct services" to preclude participation by organizations such as legal defense funds that acted as advocates for particular groups or causes.

This limitation, as implemented by OPM, was struck down by a Federal district court in *NAACP Legal Defense and Educational Fund, Inc.* v. *Campbell*, 504 F. Supp. 1365 (D.D.C. 1981). In that case, Judge Gerhard Gesell held that participation in the CFC was activity protected by the First Amendment and that "the government must meet First Amendment strictures in its regulations concerning access to this channel of communication, which is, in fact, the only channel by which organizations can appeal to government employees at their workplace." 504 F. Supp. at 1367. Based on this finding, the court ruled that the "direct services" requirement in OPM's regulations was not a clear enough standard upon which to exclude political advocacy groups. The court stated that the direct services language, "standing alone, is too vague to conform with the strict standards of specificity required when limits are placed on First Amendment activity." *Id.* Therefore, the court concluded that the CFC could not exclude advocacy groups such as the NAACP Legal Defense and Educational Fund on the basis of the vaguely worded standard. In so ruling, however, the Court exhorted "the government officials responsible for the program to re-examine the basic premises on which the program was established so that more acceptable standards can be developed which will ensure continuation of the government's significant and useful support for worthy charity." 504 F. Supp. at 1369.

After this decision, this Administration decided to revise President Kennedy's Executive Order, but after considering various alternatives, decided, at least for the 1982 campaign, to retain the previous definition of eligible agencies, even though it recognized that the Government would not be able to use that standard to exclude groups such as the NAACP Legal Defense Fund and other organizations that participate in litigation in order to influence public policy. Therefore, the CFC now includes representatives of a wide variety of points on the political spectrum, including, for example, the National Right to Work Legal Defense Foundation, the NOW (National Organization for Women) Legal Defense and Education Fund, and the Sierra Club Legal Defense Fund. Many additional politically oriented groups, apparently qualifying as legal defense or similar funds, have applied to participate in the 1983 CFC. Among them is a group called the "National Association for the Advancement of White People."

The influx of politically oriented litigation groups, as opposed to organizations providing direct health and welfare services to individuals, has adversely affected the CFC in the 1982 campaign. Many employees objected to the participation of certain newly admitted groups. Several unions organized boycotts of the CFC because of the participation of such groups as the Right to Work Legal Defense Fund. The boycotts and protests caused a decline in the number of contributors to the CFC. Although the total amount of money raised in 1982 was slightly greater than in 1981, this result was achieved notwithstanding the many controversies that prevented the CFC from attaining a higher level of success. Threatened group or individual boycotts were limited by the Administration's promise to restrict next year's CFC to traditional health and welfare charities. If the participation requirements are not modified, OPM anticipates that there will be a significant drop in contributions to the 1983 CFC.

In addition, as the President has said, there are moral dimensions to this issue. The CFC is meant to promote the health of all Americans and the welfare of the needy; in so doing, it is meant to lessen the burdens of government in these fields. It is not intended to be a general vehicle for Government-supported fund-raising on behalf of all philan-

thropy. It is certainly not proper for the Government to use taxpayer resources to raise funds for advocacy organizations and political education groups, however worthy or sympathetic may be their causes.

Because of the problems caused by the participation of aggressive and controversial political and legal advocacy groups, and because it is becoming increasingly difficult to draw any lines and keep participation to a manageable number of organizations, the President has directed us to revise the Executive Order to limit the CFC to traditional health and welfare agencies. These revisions are set forth in the attached draft Order. It would eliminate from the existing Executive Order the reference to "such other national voluntary agencies as may be appropriate," so that § 1 of the Order would limit participation to "voluntary health and welfare agencies." It would also amend § 2 of the existing Order to establish certain principles and policies to guide the Director of OPM in developing specific criteria for participation in the CFC. These policies specify that participants (agencies that would be listed to receive designated donations by individual employees) must be "voluntary, charitable, health and welfare agencies that provide or substantially support direct health and welfare services to individuals or their families." In addition, the draft states:

> Such direct health and welfare services must be available to Federal employees in the local campaign solicitation area, unless they are rendered to needy persons overseas. Such services must directly and primarily benefit human beings, whether children, youth, adults, the aged, the ill and infirm, or the mentally or physically handicapped. Such services must consist of care, research, or education in the fields of human health or social adjustment and rehabilitation; relief of victims of natural disasters and other emergencies; or assistance to those who are impoverished and therefore in need of food, shelter, clothing, education, and basic human welfare services.

Finally, the draft also contains a specific limitation that provides:

> Agencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves shall not be deemed charitable health and welfare agencies and shall not be eligible to participate in the Combined Federal Campaign.

III. PURPOSE OF THE NEW EXECUTIVE ORDER

The purpose of the new Executive Order is to restate the legitimate government interest in establishing the CFC: to prescribe necessary eligibility standards for participation in the CFC that are consistent with those legitimate government interests; and to set forth such standards with the precision necessary to meet constitutional requirements when the government affects or restricts First Amendment activities. The new Executive Order would modify Executive Order 12353 (March 23, 1982).

A summary of the salient features of the proposed Executive Order is as follows:

Section 1(a) modifies §1 of the existing Executive Order by deleting the words "such national" and "and such other national voluntary agencies as may be appropriate." This change has three effects. First, it permits participation in the CFC by local as well as national voluntary agencies, in keeping with the President's emphasis on community action. Second, it confines participation in the CFC to voluntary health and welfare agencies, Third, it limits the discretion of the Director of OPM by removing the injunction that he determine which "other national voluntary agencies ... may be appropriate." Instead, the President has determined that only participation by health and welfare charities is appropriate, and there is therefore no justification for the Director to have license to determine the "appropriateness" of any non-health-and-welfare organization.

Section 1(b) informs the rule-making discretion of the Director of OPM by establishing a clear policy governing eligibility for CFC participation that makes it a vehicle for fund-raising for health and welfare charities; by expressly limiting eligibility to health and welfare charities and defining the nature and characteristics of such charities; by expressly excluding advocacy, lobbying, and political action groups from the CFC; by expressly setting the requirement

of a direct local presence so that the campaign be a local community effort but also by expressly permitting participation by international health and welfare charities that, by dint of the external emphasis of their work, may not have local presences in CFC solicitation areas; and by expressly permitting participation by unaffiliated, local health and welfare charities.

Section 2 continues in force all current CFC rules and regulations unless and until they are modified or revoked in accordance with the new Order.

IV. BUDGETARY IMPLICATIONS

There are no increased budgetary requirements associated with the new Executive Order. Some indirect economies may reasonably be anticipated in terms of reducing the time required of the local Federal officials to arrange for, and supervise, the conduct of local CFCs in their respective areas. Because litigation is highly likely, modest costs of legal defense will be incurred.

V. TIMING

For reasons set forth in the Introduction to this memorandum, the earliest possible promulgation of the Executive Order is required. Preparations for the 1983-1984 CFC are already two months behind schedule.

VI. CONCLUSION

As President Reagan said in his recent memorandum on the Combined Federal Campaign, "Through voluntary giving, we prove that individuals can do on their own without having to go through government channels." This is particularly true at a time when the imperative of revitalizing the private sector of the economy necessitates retrenchment in Federal expenditures. These cutbacks in social assistance programs could be partially, even if modestly, offset by the efforts of private, voluntary health and welfare organizations aided by the support derived through the CFC. The revised Executive Order is urgently required if the CFC is to continue to fulfill its intended purposes of lessening governmental burdens, strengthening private health and welfare institutions, and meeting America's health and welfare needs.

EXECUTIVE ORDER
CHARITABLE FUND-RAISING

By the authority vested in me as President by the Constitution of the United States of America, and in order to lessen the burdens of government and of local communities in meeting needs of human health and welfare, it is hereby ordered as follows:

Section 1. Executive Order 12353 is amended as follows:

(a) In Section 1 delete "such national" and "and such other national voluntary agencies as may be appropriate".

(b) In Section 2 insert "(a)" after the Section number and add the following new subsections:

"(b) In establishing those criteria, the Director shall be guided by the following principles and policies:

"(1) The objectives of the Combined Federal Campaign are to lessen the burdens of government and of local communities in meeting needs of human health and welfare; to provide a convenient channel through which Federal public servants may contribute to these efforts; to minimize or eliminate disruption of the Federal workplace and costs to Federal taxpayers that such fund-raising may entail; and to avoid the reality and appearance of the use of Federal resources in aid of fund-raising for political activity or advocacy of public policy, lobbying, or philanthropy of any kind that does not directly serve needs of human health and welfare.

"(2) To meet these objectives, eligibility for participation in the Combined Federal Campaign shall be limited to voluntary, charitable, health and welfare agencies that provide or substantially support direct health and welfare services to individuals or their families. Such direct health and welfare services must be available to Federal employees in the local campaign solicitation area, unless they are rendered to needy persons overseas. Such services must directly and primarily benefit human beings, whether children, youth, adults, the aged, the ill and infirm, or the mentally or physically handicapped. Such services must consist of care, research, or education in the fields of human health or social adjustment and rehabilitation; relief of

victims of natural disasters and other emergencies; or assistance to those who are impoverished and therefore in need of food, shelter, clothing, education, and basic human welfare services.

"(3) Agencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves shall not be deemed charitable health and welfare agencies and shall not be eligible to participate in the Combined Federal Campaign.

"(4) International organizations that provide health and welfare services overseas, and that meet the eligibility criteria except for the local services criterion, shall be eligible to participate in each local solicitation area of the Combined Federal Campaign.

"(5) Local voluntary, charitable, health and welfare agencies that are not affiliated with a national agency or federation but that satisfy the eligibility criteria set forth in this Order and by the Director, shall be permitted to participate in the Combined Federal Campaign in the local solicitation areas in which they provide or substantially support direct health and welfare services."

Section 2. All rules, regulations, and directives continued or issued under Executive Order No. 12353 shall continue in full force and effect until revoked or modified under the provisions of this Order.

THE WHITE HOUSE
February , 1983

STATEMENT OF THE NATIONAL COALITION FOR HEALTH AND WELFARE

We applaud the correct and decisive action of President Reagan and Director Devine in restoring the Combined Federal Campaign to its proper role as an instrument of support for America's truly needy. By firmly establishing the CFC as a fund-raising appeal on behalf of health and welfare charities, they have ensured the continued support of the Federal work force for these vital efforts.

America's Federal workers—including civil servants, postal employees, and our men and women in uniform—have always been generous with their personal resources. Over the years, their sustained support has meant a great deal in the common fight against hunger, ignorance, poverty, and disease. The Combined Federal Campaign has been, and should be, an important channel of assistance to the private-sector charities that are the front-line in the struggle for American health and well-being, not just at the national level, but in every local community across-the land. We know that this is President Reagan's goal, too, and we are grateful that today's action moves so strongly in the right direction.

The undersigned organizations which are members of the National Coalition for Health and Welfare, representing the community of America's private-sector health and welfare charities, extend to President Reagan, Director Devine, and every Federal employee our heartfelt thanks for your generosity and our pledge to continue to work in partnership with you toward our common goals:

American Cancer Society
American Foundation for the Blind
American Kidney Fund, Inc.
American Lung Association
American Red Cross
Boy Scouts of America
Camp Fire, Inc.
Council of Jewish Federations, Inc.
Family Service Association of America
Girl Scouts of the U.S.A.

March of Dimes Birth Defects Foundation
National Board of the YWCA of the U.S.A.
National Conference of Catholic Charities
National Homecaring Council
National Mental Health Association
Salvation Army
U.S.O. World Headquarters
United Way of America
YMCA of the U.S.A.
Boys Clubs of America

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS

v.

HON. DONALD J. DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT

AFFIDAVIT OF JACK GREENBERG

STATE OF NEW YORK
: SS.:
COUNTY OF NEW YORK

JACK GREENBERG, being duly sworn, deposes and says:

1. I hold the position of Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. I am chief executive officer of the Fund and as such have detailed knowledge of the Fund's purposes, programs and operations.

2. The purpose of this affidavit is to supplement my affidavit filed in support of plaintiffs' Motion for Summary Judgment granted by the Court in *NAACP Legal Defense and Education Fund, Inc.* v. *Campbell*, C.A. No. 80-1888 (504 F. Supp. 1365 (D.D.C. 1981)). The earlier affidavit is incorporated herein by reference and a copy thereof is attached hereto as Exhibit "L".

3. The Legal Defense Fund is incorporated under the laws of the State of New York as a legal aid society. Its charter states that its purpose is to provide legal assistance to Blacks who are otherwise financially unable to obtain the same. Our charter also provides that the Fund shall carry out programs in education and other related areas.

4. The litigation we bring is primarily large scale class actions in federal court. The costs of such cases are beyond the means of virtually anyone who is not extremely wealthy. For example, a Title VII case against a major em-

ployer brought as a class action typically will involve expenses of $100,000 or more to bring the case to trial. If a case is appealed the costs will be greater. Thus, although we do not have a set standard of indigency by which persons are measured before they can obtain our services, in fact in all civil cases we represent persons and classes of persons who otherwise would not be able to afford the litigation.

5. The Fund's criminal law docket consists of litigation exclusively on behalf of persons who are truly indigent. The vast majority of our criminal cases in recent years have been on behalf of persons faced with the death penalty. Since it rarely happens that a defendant of means receives the death penalty, our clients, whether white or black, are impoverished. We do not represent any such defendant who can afford his or her own counsel.

6. The Legal Defense Fund is not a political action or advocacy organization within the meaning of the Internal Revenue Code or under any reasonable definition of those terms. Any legislative activity that we conduct is in full conformity with the requirements of the Internal Revenue Code and the regulations of the Internal Revenue Service, and comprises a small percentage of the Fund's work. Much of our legislative work consists of responding to inquiries for information and testimony by committees of the Congress of the United States. Virtually all of our legislative activities relate to specific statutes or proposed legislation which would directly impact upon the work we do or upon the rights of Blacks and other minority persons.

7. We are in no way involved in political activity with regard to elections. We have over the years brought litigation relating to voting rights and the denial thereof to Black and other minority citizens. These actions are not partisan in nature, but are to enforce the rights of all Americans to equal access to the voting booth and to fair representation in legislative bodies through appropriate reapportionment and redistricting.

8. With regard to our other litigation activities, we are not involved in ligitation which is designed to bring about

changes in public policy. Almost all of our cases are filed under statutes passed by the Congress of the United States, including the Civil Rights Act of 1964, the Voting Rights Act, the Fair Housing Act, et cetera. In addition, other litigation, particularly in the area of criminal law, is brought to enforce rights guaranteed by the Constitution of the United States.

9. In virtually all of our cases, except those few in which the Legal Defense Fund itself is a party, we represent individual plaintiffs or classes of individuals. Our primary purpose is to represent individuals and classes of individuals to help them secure their rights under the laws and Constitution of the United States. Although our litigation is designed to assist certain groups of persons, primarily Blacks and, to a lesser extent, other minorities, it is not brought for abstract causes.

10. As described in our earlier pleadings, and as set out in the earlier decision of this Court, the result of our litigation has been the conferring of specific benefits directly to individuals. For example, we have just recently settled a fair employment action against a major tobacco company which resulted in the payment of $3.8 million in back pay to black present and former employees of the company. In 1982 alone our fair employment cases resulted in $8,000,000 in back pay for our clients. In another recently settled action against a major city police department, Blacks will receive specific promotions to particular jobs and thus higher pay and benefits. As a result of other actions, hospitals will be providing additional health care to indigent Blacks and other patients, and presently segregated school systems will be integrated, resulting in better education, in conformity with the Constitution for all children. We continue with our scholarship programs, which grant hundreds of thousands of dollars annually in scholarships to black students to pursue undergraduate and law degrees. Other litigation currently on our docket involves equal access to housing and to other public benefits. Thus, in every respect, the result of our work is to provide direct services

and benefits to persons long denied jobs, equal incomes, housing, and education, among other basic human needs.

/s/ Jack Greenberg
JACK GREENBERG

Sworn to and subscribed before
me this 22nd Day of March, 1983.
/s/ Gloria A. Jones
GLORIA A. JONES
Notary Public

EXHIBIT L, GREENBERG AFF.; C.A. NO. 83-

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1888

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.,
PLAINTIFF,

v.

HON. ALAN CAMPBELL, DIRECTOR,
UNITED STATES OFFICE OF PERSONNEL MANAGEMENT,
DEFENDANT.

Civil Action No. 80-2070

PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND,
INC., PLAINTIFF,

v.

HON. ALAN CAMPBELL, DIRECTOR,
UNITED STATES OFFICE OF PERSONNEL MANAGEMENT,
DEFENDANT.

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JACK GREENBERG, having been duly sworn, deposes and says:

1. I am an attorney admitted to the practice of law in the State of New York and in various federal courts.

2. Since 1961 I have held the position of Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc., and am the chief executive officer of the corporation. I was first employed by the Fund in 1948 and have worked for it continuously since. My responsibilities as

Director-Counsel have required me to become familiar with the history of the organization and the various documents relating to that history. Similarly, my duties require me to be knowledgeable of the actions of the Fund's Board of Directors, all of the meetings of which I attend, and of the day to day operations of the Fund's staff. Therefore, the matters set out in this affidavit are based on my personal knowledge.

3. The NAACP Legal Defense and Educational Fund, Inc., was incorporated in 1940 following the approval by the Appellate Division of the Supreme Court, First Judicial Department under Section 280 of the Penal Law of the State of New York (now, § 495 of the Judiciary Law) which allows legal aid societies to incorporate for the practice of law. (See, Exhibit "A" for true and accurate copies of the original incorporation papers and subsequent amendments.)

4. The Fund was established pursuant to a resolution of the Board of Directors of the National Association for the Advancement of Colored People (NAACP) for the purpose of obtaining tax-exempt status for those activities of the NAACP which could so qualify. Thus, its purposes were stated:

> (a) To render legal aid gratuitously to such Negroes as may appear to be worthy thereof, who are suffering legal injustices by reason of race or color and unable to employ and engage legal aid and assistance on account of poverty.
>
> (b) To seek and promote the educational facilities for Negroes who are denied the same by reason of race or color.
>
> (c) To conduct research, collect, collate, acquire, compile and publish facts, information and statistics concerning educational facilities and educational opportunities for Negroes and the inequality in the educational facilities and educational opportunities provided for Negroes out of public funds; and the status of the Negro in American life.
>
> (d) The corporation shall not engage in any activities for the purpose of carrying on propaganda, or otherwise attempting to influence legislation, and shall operate without pecuniary benefit to its members.

(See, Exhibit "A"). On April 30, 1940, the Office of the Commissioner of Internal Revenue granted the Fund tax-exempt status, which it has continued to enjoy, under the predecessor to Section 501(c)(3) of the Internal Revenue Code. (See, Exhibit "B", consisting of true and accurate copies of official documents relating to the Fund's tax-exempt status.)

5. For many years the NAACP and the NAACP Legal Defense Fund had interlocing boards of directors and operated out of the same offices. However, because of the requirements of the internal revenue laws as they were then written, the two organizations became completely separate in fact as well as in law by late in the 1950s. Thus, for more than 20 years the Fund has had its own Board of Directors, staff, fund-raising operation, and budget. It is completely independent of all other organizations. Because of changes in the internal revenue laws which allowed a non-tax-exempt organization to set up a subsidiary corporation to conduct activities that were eligible for tax-exemption, the NAACP established the NAACP Special Contribution Fund in the early 1960s. The Special Contribution Fund conducts litigation and other charitable activities of the NAACP and therefore now performs the same role as did the Legal Defense Fund when it was originally established.

6. The central purpose of the NAACP Legal Defense Fund is to achieve full equality for Blacks and other minorities through a variety of means. Its main activity is litigation, but it also distributes approximately $500,000 in scholarships each year to undergraduate and law students, conducts education activities for attorneys engaged in civil rights work, and has other public information and community development programs.

7. The Fund's litigation program is carried out by 19 lawyers in its New York Office and three lawyers in its Washington office, working in co-operation with hundreds of lawyers in private practice throughout the country. The involvement of Fund attorneys in a particular case may range from handling it from its inception, including drafting the pleadings, preparing for trial, trying the case, etc., to coming in at the appellate or Supreme Court levels. In all

Fund cases (except the relatively few in which it acts as *amicus curiae*) its attorneys are attorneys of record and directly represent the clients in every sense of the word. They may act as lead counsel or in a supporting role, depending on the nature of the case, the needs of the cooperating attorney, and available resources.

8. The Fund's cases have involved virtually all subjects the civil rights area, the single largest category in recent years, being employment discrimination cases against private employers, state and local governments, and federal agencies including, incidentally, the Office of Personnel Management itself. We also represent plaintiffs in cases in the areas of school desegregation, housing discrimination, health care, voting rights, prison reform, and police misconduct. In addition, we represent criminal defendants, mostly persons facing the death penalty. (See, Exhibit "C" and "D", the Fund's current docket and annual reports which contain a list of its cases and a description of its programs.)

9. Because our program is nationwide and our resources are limited, we are not able to represent all persons who seek our services. Our case selection is based on a number of criteria. First, the case must relate to our overall goal of promoting equal justice and equality of opportunity of Blacks and other minorities, although this does not mean that we limit our services to a particular racial group. In the capital punishment area, for example, we represent all persons faced with the death penalty and have obtained the reversal of death sentences of well over 1,000 persons of all races. Second, although our charter speaks of services to "indigents," we do not have a set income test; most of our cases are major class actions which are beyond the means of all but the wealthy.

10. Third, and of central importance, we select cases based on their potential for providing direct benefits to as many persons as possible. In the area of employment discrimination, for example, we have sought to identify those industries and employers which, if their patterns of discrimination were changed, would provide maximum opportunities to Blacks. Thus, many of our cases are against such

growth industries as pulp and paper, textiles, and trucking in the South, and against such major employers as the United States Steel Corporation and agencies of the federal government. Since our cases are class actions brought on behalf of all Blacks or minority employees, applicants for employment, etc., we are able to represent and obtain direct benefits for thousands of persons in a single lawsuit. As a result, we have obtained tens of millions of dollars in back pay for hundreds of thousands of individuals, as well as incalculable future benefits in the form of promotions, etc. (See, Exhibit "E" for a compilation of representative cases in the period up to 1979.) Our other cases have also resulted in direct and concrete benefits to individuals. To give some recent examples, a case against a major hospital in Gary, Indiana, culminated in the spending of approximately $20,000,000 to upgrade an inner-city facility and provide greatly increased health care services to its client population. An action against the Georgia Department of Corrections resulted in the expenditure of nearly $20,000,000 for new central medical and mental health care facilities, as well as the renovation of the main prison facility at a cost of over $46,000,000. And, of course, our continuing school desegregation litigation has resulted, ever since *Brown* v. *Board of Education* in 1954, in incalculable improvement in the educations received by hundreds of thousands of Blacks with all of the benefits flowing therefrom.

11. For these reasons, the conclusion that the NAACP Legal Defense Fund does not provide "direct services," in any accepted meaning of that term, is based on a complete lack of understanding of the nature and effect of the Fund's activities. Its lawyers represent clients directly in the same way as do other lawyers; it is not engaged in the vindication of some abstract principle. Rather, it selects cases with a view towards making equal opportunity a practical and concrete reality. As a result, hundreds of thousands of persons have received direct benefits such as income supplementation in the form of back pay and future earnings, better educations, improved health care, better housing and other living conditions, humane conditions of incarceration

and, in the case of our capital punishment program, life itself.

/s/ Jack Greenberg
JACK GREENBERG

Subscribed and sworn to before me this 25th day of November, 1980.

/s/ Gloria A. Jones
GLORIA A. JONES
Notary Public

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 15th day of March 1940

Present—Hon. FRANCIS MARTIN, *Presiding Justice*,
Hon. JAMES O'MALEFY,
Hon. ALFRED H., TOWNLEY, JUSTICES
Hon. EDWARD S. DORF,
Hon. ALBERT COHN, *Justices*

IN THE MATTER OF THE APPLICATION
FOR THE APPROVAL OF CERTIFICATE OF INCORPORATION

of

N.A.A.C.P. LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.

A motion having been made by the N.A.A.C.P. Legal Defense and Educational Fund, Inc., for the approval by this court, pursuant to section 280 of the Penal Law of the State of New York, of the certificate of incorporation proposed to be filed with the Secretary of State at Albany, New York, by the said N.A.A.C.P. Legal Defense and Educational Fund, Inc.,

Now, upon reading and filing the notice of motion, with proof of due service thereof upon the Association of the Bar of the City of New York, the New York County Lawyers' Association and the Bronx County Bar Association, and the affidavit of Arthur B. Spingarn in support of said motion, and after hearing Mr. Arthur B. Spingarn for the motion, and no one appearing in opposition,

It is ordered that the said motion be and the same is hereby granted, and this court hereby approves of the Certificate of Incorporation of N.A.A.C.P. Legal Defense and Educational Fund, Inc., executed and acknowledged on the 11th day of October, 1939.

APPELLATE DIVISION OF THE SUPREME COURT,
FIRST JUDICIAL DEPARTMENT,
Clerk's Office, County of New York.

I, GEORGE T. CAMPBELL, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing is a copy of the order made by said court in the above entitled proceeding, and entered in my office on the 15th day of March, 1940.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, in the County of New York, this 15th day of March, 1940.

/s/ _____
GEORGE T. CAMPBELL
Clerk

(SEAL)

THE UNIVERSITY OF THE STATE OF NEW YORK

STATE OF NEW YORK:
: SS.
COUNTY OF ALBANY:

Pursuant to the provisions of Section 11, Article 2 of the Membership Corporations Law, as amended by Chapter 320 of the Laws of 1935, consent is hereby given to the filing of the annexed certificate of incorporation of "N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC." as a membership corporation.

This consent, however, shall in no way be construed as an approval by the Education Department, Board of Regents or Commissioner of Education of the purposes and objects of this corporation, nor shall it be construed as giving the officers or agents of this corporation the right to use the name of the University of the State of New York, Education Department, Board of Regents or Commissioner of Education in its publications and advertising matter.

IN WITNESS WHEREOF, I Ernest E. Cole, Acting Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 13th day of October, 1939.

/s/ _____
ERNEST E. COLE
Acting Commissioner
of Education

(SEAL)

CERTIFICATE OF INCORPORATION OF N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Pursuant to Article II of the
Membership Corporations Law

We, the undersigned, desiring to form a membership corporation pursuant to Article II of the Membership Corporation Law of the State of New York, do hereby make, subscribe and acknowledge this Certificate for that purpose, as follows:

FIRST: The name of the proposed corporation is N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

"N.A.A.C.P." is the abbreviation for the name National Association for the Advancement of Colored People.

SECOND: The corporation is to be formed for the following purposes:

(a) To render legal aid gratuitously to such Negroes as may appear to be worthy thereof, who are suffering legal injustices by reason of race or color and unable to employ and engage legal aid and assistance on account of poverty.

(b) To seek and promote the educational facilities for Negroes who are denied the same by reason of race or color.

(c) To conduct research, collect, collate, acquire, compile and publish facts, information and statistics concerning educational facilities and educational opportunities for Negroes and the inequality in the educational facilities and educational opportunities provided for Negroes out of public funds; and the status of the Negro in American life.

(d) The corporation shall not engage in any activities for the purpose of carrying on propaganda, or otherwise attempting to influence legislation, and shall operate without pecuniary benefit to its members.

THIRD: The territory in which its operations are principally to be conducted is the United States of America, the

territories, colonies and dependencies of the United States of America and the District of Columbia.

FOURTH: The office of the corporation shall be located in the Borough of Manhattan, City, County and State of New York.

FIFTH: The number of its directors shall be not less than five, and not more than fifty.

SIXTH: The names and residences of the directors until the first annual meeting are as follows:

Dr. William Allan Neilson
470 West 24th Street
New York City, New York

Mr. Arthur B. Spingarn
60 Gramercy Park, North
New York City, New York

Hon. William H. Hastie
1221 Fairmont Avenue, N.W.
Washington, D.C.

Hon. Herbert H. Lehman
State Executive Mansion
Albany, New York

Miss Mary White Ovington
12 East 97th Street
New York City, New York

Hon. Charles F. Toney
409 Edgecombe Avenue
New York City, New York

Hon. Hubert T. Delany
335 Edgecombe Avenue
New York City, New York

SEVENTH: All of the subscribers to this certificate are of full age; at least two thirds of them are citizens of the United States; at least one of them is a resident of the State of New York. Of the persons named as directors, at least one is a citizen of the United States and a resident of the State of New York.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 11th day of October, 1939.

/s/ _____
WILLIAM A. NEILSON (L.S.)

/s/ _____
ARTHUR B. SPINGARN (L.S.)

/s/ _____
MARY W. OVINGTON (L.S.)

/s/ _____
CHARLES E. TONEY (L.S.)

/s/ _____
HUBERT T. DELANY (L.S.)

STATE OF NEW YORK :
: ss.
COUNTY OF NEW YORK :

On this 11th day of October, 1939, before me personally came William A. Neilson, Arthur B. Spingarn, Mary W. Ovington, Charles E. Toney, Hubert T. Delany, to me known and known to be the same persons described in and who executed the foregoing certificate of incorporation and they thereupon duly and severally acknowledged to me that they executed the same.

FRANK M. TURNER
NOTARY PUBLIC
Queens Co. Clk. No. 3089
N.Y. Co. Clk. No. 336
Commission expires March 30, 1940

STATE OF NEW YORK :
: ss.
COUNTY OF NEW YORK :

/s/ H. H Zand, BEING duly sworn deposes and says: That he is the attorney for the subscribers to the annexed Certificate of Incorporation, that no previous application for the approval of said Certificate has been made to any Justice of the Supreme Court of the State of New York.

Sworn to before me this 11th day of October, 1939.

/s/ _____
H.H. ZAND

FRANK M. TURNER
NOTARY PUBLIC
Queens Co. Clk. No. 3039
N.Y. Co. Clk. No. 336
Commission expires March 30, 1940

I, HON. JULIUS MILLER, a Justice of the Supreme Court of the State of New York, hereby approve the foregoing Certificate of Incorporation of N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. Dated, N.Y. October 25, 1939.

/s/ _____
JULIUS MILLER
Justice of the Supreme Court
of the State of New York

APPELLATE DIVISION OF THE SUPREME COURT,
FIRST JUDICIAL DEPARTMENT

IN THE MATTER OF THE APPLICATION FOR
THE APPROVAL OF CERTIFICATE OF INCORPORATION

of

N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

STATE OF NEW YORK:
: SS.
COUNTY OF NEW YORK:

ARTHUR B. SPINGARN, being duly sworn, deposes and says; that he is an Attorney-at-Law admitted to practice in the State of New York, with offices at No. 36 West 44th St., Borough of Manhattan, New York City.

That he is one of the subscribers to the Certificate of Incorporation of "N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.", and one of the members of the Board of Directors named therein to serve until the first Annual Meeting of said corporation, and is fully familiar with all the facts and matters relating to the proposed corporation.

That this affidavit is made for the purpose of obtaining the approval by this Court, pursuant to Section 280 of the Penal Law of the State of New York, to the Certificate of Incorporation proposed to be filed with the Secretary of State at Albany, New York.

That said corporation is being organized under Article II of the Membership Corporations Law, and said Certificate of Incorporation was approved by Mr. Justice Julius Miller, a Justice of the Supreme Court of the State of New York, under date of October 25th, 1939, and the consent of the State Education Department was obtained under date of October 13th, 1939; all of which more fully appears in the copy of the Certificate of Incorporation hereto attached, the original of which will be submitted to this Court upon the return day of the motion.

That the proposed corporation is being organized solely for benevolent and charitable purposes, without pecuniary benefits to its members or directors.

That the purposes as set forth in the Certificate of Incorporation are: —— ——

"SECOND:—The corporation is to be formed for the following purposes:

(a) To render legal aid gratuitously to such Negroes as may appear to be worthy thereof, who are suffering legal injustices by reason of race or color and unable to employ and engage legal aid and assistance on account of poverty.

(b) To seek and promote the educational facilities for Negroes who are denied the same by reason of race or color.

(c) To conduct research, collect, collate, acquire, compile and publish facts, information and statistics concerning educational facilities and educational opportunities for Negroes and the inequality in the educational facilities and education opportunities provided for Negroes out of public funds; and the status of the Negro in American life.

(d) The corporation shall not engage in any activities for the purpose of carrying on propaganda, or otherwise attempting to influence legislation, and shall operate without pecuniary benefit to its members."

That the activities which the proposed corporation intends to carry on under subdivision (a) of paragraph "Second" of said Certificate of Incorporation are as follows:

To take all necessary and proper steps provided for by law in such instances where the individuals involved are not in a financial position to do so, in order that the rights guaranteed and provided for Negro citizens under the Constitution of the United States of America and of the several States may not be denied to them because of their race or color.

To investigate all meritorious complaints which are brought to its attention, and, in such instances where the proposed corporation deems it within its purposes as aforesaid, to provide funds for the retention of an attorney or attorneys in each individual case, said attorney or attorneys to represent the individuals personally whose legal rights are affected.

The proposed corporation also intends to furnish funds for the purpose of engaging the services of an attorney or attorneys:

(a) To institute or defend legal actions in such cases where the Constitutional rights of indigent Negroes are involved;

(b) To institute and defend such actions as will protect the rights of Negro citizens to vote and in order that the rights of said Negro citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race or color;

(c) To secure to indigent Negroes the right to a fair and impartial jury trial, so that such a trial shall not be denied to them by reason of their race or color; and

(d) To maintain such legal actions as may be necessary to contest any laws which tend to abridge the privileges or immunities of Negro citizens of the United States guaranteed by the Federal and the several State Constitutions, and which tend to deprive said Negro citizens of their life, liberty or property without due process of law and which tend to deny to said Negro citizens the equal protection of the laws.

The proposed corporation sought to be formed does not intend to act as a general legal aid society, but will limit its activities solely to cases where the rights of indigent Negroes are involved and only in such instances where they are deprived of said rights solely by reason of the fact that they are Negroes. In no instance will the proposed corporation make any charge or receive any compensation or remuneration from the individuals for whom funds for the retention of counsel are provided. The proposed corporation will not engage in any activities prohibited in said Section 280 of the Penal Law and its activities will be restricted solely to those hereinabove set forth and those set forth in paragraph "Second", subdivision (b), (c), and (d) of the Certificate of Incorporation.

Its proposed activities will not be restricted to the State of New York, but it intends functioning for the aforementioned purposes throughout the various States of the United States and the District of Columbia.

WHEREFORE, your deponent respectfully prays that this Court approve the Certificate of Incorporation of "N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC."

/s/ _____
ARTHUR B. SPINGARN

Sworn to before me this
2nd day of November, 1939
H.H. ZAND, Notary Public
Kings County; N.Y. County

CERTIFICATE OF AMENDMENT
OF
CERTIFICATE OF INCORPORATION
OF
N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
(under Section 803 of the Not-For-Profit Corporation Law)

Pursuant to the provisions of Section 803 of the Not-For-Profit Corporation Law, the undersigned, being the President and Secretary, respectively, of N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., hereby certify:

FIRST: That the name of the corporation is N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., (hereinafter the "Corporation").

SECOND: That the Certificate of Incorporation of the Corporation was filed with the Department of State, Albany, New York, on the 20th day of March, 1940.

THIRD: That the Corporation is a corporation as defined in subparagraph (a)(5) of Section 102 of the Not-For-Profit Corporation Law; that the Corporation is a type B corporation under Section 201 of the Not-For-Profit Corporation Law and shall continue to be a type B corporation hereafter.

FOURTH: That the post office address to which the Secretary of State shall mail a copy of any notice required by law is N.A.A.C.P. LEGAL DEFENSE AND EDUCTIONAL FUND, INC., 10 Columbus Circle, New York, New York 10019.

FIFTH: That the amendment to the Certificate of Incorporation effected by this Certificate is as follows:

Paragraph Second (d) of the Certificate of Incorporation, relating to the purposes of the Corporation, is hereby amended to read as follows:

> "(d) The corporation shall not engage in any activities for the purpose of carrying on propaganda, or otherwise attempting to influence legislation, and shall operate without pecuniary benefit to its members. The corporation is not organized, and shall not be conducted, for pecuniary profit. The property, assets, profits and net income of the Corporation are irrevocably dedicated to charitable and educational purposes and no part of the profits, net income or assets of the Corporation shall be distributable to nor ever inure to the benefit of any director, officer or member thereof or any other private shareholder or persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of its purposes. Upon the dissolution of the corporation or the winding up of its affairs, none of the property or assets of the corporation shall be made available in any way to any individual, corporation or other organization, except to corporations or other organizations located within the United States which qualify as exempt from Federal income tax under section 501(a) of the Internal Revenue Code of 1954, as the same may be from time to time amended (the "Code"), as an organization described in Section 501(c)(3) of the Code, subject to the applicable provisions of the Not-For-Profit Corporation Law of the State of New York at the time in effect, including approval, if required, by a justice of the Supreme Court of the appropriate judicial district."

SIXTH: That the above amendment to the Certificate of Incorporation was authorized by a vote of a majority of the members entitled to vote thereon at a meeting of the members.

IN WITNESS WHEREOF, we have subscribed and acknowledged this Certificate this 31st day of January, 1972.

/S/ _____
WILLIAM T. COLEMAN, JR.,
President

/s/ _____
DR. GEORGE D. CANNON,
Secretary

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

Dr. George D. Cannon, being duly sworn deposes and says that he is the Secretary of N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., the corporation mentioned and described in the foregoing instrument; that he has read and signed the same and that the statements contained therein are true.

/s/ _____
DR. GEORGE D. CANNON

Sworn to before me this 31st
day of January, 1972.

/s/ _____
GLORIA A. JONES
Notary Public

SUPREME COURT: NEW YORK COUNTY

IN THE MATTER OF THE APPLICATION
FOR THE APPROVAL OF THE CERTIFICATE
OF AMENDMENT OF THE CERTIFICATE OF
INCORPORATION

OF

N.A.A.C.P. LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
PURSUANT TO SECTION 804 OF THE NOT-FOR-PROFIT
CORPORATION LAW.

APPROVAL

I, ABRAHAM J. GELLINOFF, a Justice of the Supreme Court of the State of New York in the First Judicial District wherein the principal office of N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., is located, do hereby approve the within Certificate of Amendment of the Certificate of Incorporation of N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

/s/ Abraham J. Gellinoff
JUSTICE OF THE SUPREME COURT

NOTICE OF APPLICATION WAIVED.
(THIS IS NOT TO BE DEEMED AN APPROVAL
ON BEHALF OF ANY DEPARTMENT OR AGENCY
OF THE STATE OF NEW YORK, NOR AN
AUTHORIZATION OF ACTIVITIES OTHERWISE
PROHIBITED BY LAW.)

DATED: MARCH 2, 1972
[Illegible]
Attorney General

BY /s/ [Illegible]
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF AMENDMENT
OF
CERTIFICATE OF INCORPORATION
OF
N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
(under Section 803 of the Not-For-Profit Corporation Law)

State of New York
Department of State
Filed Mar 23 1972

APPELLATE DIVISION OF THE SUPREME COURT
FIRST JUDICIAL DEPARTMENT

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the City and County of New York, on the 20th day of June, 1974.

Present: Hon. Owen McGivern, Presiding Justice
Hon. Arthur Markewich,
Hon. Emilio Nunez
Hon. Theodore R. Kupferman
Hon. Francis T. Murphy, Justices

IN THE MATTER OF THE
APPLICATION FOR THE EXTENSION OF
APPROVAL OF THE N.A.A.C.P. LEGAL
DEFENSE AND EDUCATIONAL FUND, INC.

ORDER

Upon reading and filing the petition of the N.A.A.C.P. Legal Defense and Educational Fund, Inc. for extension of approval of the organization, verified the 17th day of April, 1974, by Jack Greenberg, its Director-Counsel, and the verified petition filed April 14, 1971, and upon reading and filing the reports of the activities of the said organization submitted in 1971, 1972, 1973 and 1974, and upon motion of said petitioner and due deliberation having been had thereon, it is

ORDERED, that the petitioner's application for an extension of approval of the existence of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., heretofore granted by order of this Court dated March 15, 1940, be and the same hereby is granted subject to the terms of this Order; and it is further

ORDERED, that the existence, organization and incorporation of the N.A.A.C.P. Legal Defense and Educational Fund, Inc. for the purpose of providing legal services in the area of civil rights and poverty law as described in the verified petition of the director-counsel, the certificate of

incorporation, and the report submitted pursuant to Section 608.8 of the rules of this Court, be and the same is, approved pursuant to the requirements of Section 495 of the Judiciary Laws of the State of New York, further

ORDERED, that the duration of the approval of the N.A.A.C.P. Legal Defense and Educational Fund, Inc. shall be for an indefinite period subject to the provisions of the rules of this Court, and it is further

ORDERED, that in accordance with Section 608.6 of the Rules of this Court the requirements thereof with respect to the membership of the governing board shall not apply to this Corporation which was heretofore organized and approved, and further

WHEREAS, it appears from the record and petition of the corporation that it is sometimes necessary and appropriate to accomplish the purposes of the corporation for it to furnish legal services to other corporations, associations or organizations, including civil rights groups, political groups, factions or parties, where, for example, it is alleged that such groups are suffering legal deprivation by reason of race or color or in violation of other constitutional or legal guarantees, and it appearing to the Court that such litigational activities of the corporation may be constitutionally protected forms of free speech and association, and the Court desiring to construe and apply its rules consistently with such constitutional protections, it is

ORDERED, that the prohibitions of Section 608.7(b) and (c) shall not apply to the N.A.A.C.P. Legal Defense and Educational Fund, Inc., provided, however, that the corporation shall continue to comply with the provisions of its charter prohibiting engaging in propaganda or otherwise attempting to influence legislation and shall continue to comply with the laws relating to tax exempt organizations prohibiting intervention in political campaigns on behalf of candidates and lobbying to influence legislation, and further

WHEREAS, the N.A.A.C.P. Legal Defense and Educational Fund, Inc. is dependent upon receiving financial support from the general public and conducts substantial fund solicitation efforts to support the work of the organization, and is required in connection therewith to give public notice

of the litigation program which it conducts and to advertise its programs and accomplishments, and, furthermore, whereas the purposes of the corporation as stated in its articles of incorporation include compiling and publishing facts, information and statistics concerning educational facilities and opportunities for Negroes and the status of the Negro in American life, and further, whereas the proper conduct of the corporation's programs to eliminate racial discrimination may require that the organization give notice of the availability of its services to persons who may receive such services, and such publications are constitutionally protected forms of free expression, now, therefore, it is

ORDERED, that the N.A.A.C.P. Legal Defense and Educational Fund, Inc. may publish, distribute and disseminate information of the nature of the services it renders, and it is further

ORDERED, that the N.A.A.C.P.Legal Defense and Educational Fund, Inc. shall continue to comply with the provisions of its charter that it provide legal services gratuitously and without fee, except that the corporation may receive counsel fees awarded to it by a court of competent jurisdiction (as, for example, authorized by Congress in various civil rights laws such as the Civil Rights Act of 1964 and 1968), and further provided that nothing herein shall prevent the said corporation from furnishing supplementary legal or financial assistance or aid in cases where private attorneys (not members of the Fund's staff) have an attorney-client relationship which may include a fee arrangement, and it is further

ORDERED, that the N.A.A.C.P. Legal Defense and Educational Fund, Inc. may refer persons requiring legal services involving the general categories of civil rights issues which comprise its litigation program to any attorneys who may desire to cooperate with the organization in the conduct of its work, or to other civil rights organizations, legal aid societies, legal service programs or organizations approved by this Court, and provided that persons requesting assistance not within the scope of the Fund's work may be referred to any approved legal aid or legal services

program or to any duly maintained and authorized referral service, and it is further

ORDERED, that the annual reports of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., filed pursuant to the requirements of Section 608.8 of the Rules of this Court shall be kept confidential by the Clerk of Court subject to the power of the Court to permit disclosure upon good cause shown and after notice to the reporting organization.

Dated: New York, New York
April ____, 1974.

ENTER FOR THE COURT
/s/ [Illegible]
Presiding Justice

Associate Justices

[Filed Jun 20 1974]

At a term of the Appellate Division, First Judicial Department, Supreme Court, State of New York, held at the Courthouse, 27 Madison Avenue, New York, New York, on March 24, 1977.

Filed MARCH 24, 1977

PRESENT:

Hon. HAROLD A. STEVENS, *Presiding Justice*
Hon. THEODORE R. KUPFERMAN
Hon. FRANCIS T. MURPHY, JR.
Hon. VINCENT A. LUPIANO
Hon. HAROLD BIRNS, *Justices*

In the Matter of the

APPLICATION FOR MODIFICATION OF THE CERTIFICATE OF INCORPORATION OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

ORDER

Upon reading and filing the petition of the N.A.A.C.P. Legal Defense and Educational Fund, Inc. for modification of its Certificate of Incorporation, verified the 10th day of November, 1976, by Jack Greenberg, the Director-Counsel of petitioner, and upon motion of said petition and due deliberation having been had thereon, it is

ORDERED, that the application of petitioner for modification of its Certification of Incorporation by increasing the authorized number of members of the petitioner's Board of Directors to 100 is granted.

ENTER
FOR THE COURT
/s/ Harold A. Stevens
HAROLD A. STEVENS
Presiding Justice

At a Term of the Appellate Division of the Supreme Court, held in and for the First Department, at the Courthouse thereof, in the County of New York on the 24th day of March, 1976.

Filed MARCH 24, 1976

PRESENT:

HAROLD A. STEVENS, *Presiding Justice*
ARTHUR MARKEWICH,
THEODORE R. KUPFERMAN,
FRANCIS T. MURPHY, JR.,
VINCENT A. LUPIANO, *Justices.*

In The Matter of the

APPLICATION OF MODIFICATION OF THE CERTIFICATE OF INCORPORATION OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

ORDER

Upon reading and filing the petition of the N.A.A.C.P. Legal Defense and Educational Fund, Inc. for modification of its Certificate of Incorporation, verified the 29th day of January, 1976, by Jack Greenberg the Director-Counsel of petitioner, and upon motion of said petition and due deliberation having been had thereon, it is

ORDERED, that the application of petitioner for modification of its Certificate of Incorporation by addition of the phrase "(except that in California the Corporation's property, assets, profits and net income are irrevocably dedicated to charitable purposes within the meaning of Sec. 214 of the California Revenue and Taxation Code)," to the third

sentence of Paragraph Second (d) of petitioner's Certificate of Incorporation is granted.

ENTER
FOR THE COURT
/s/ Harold A. Stevens
HAROLD A. STEVENS
Presiding Justice

Dated: New York, New York
MARCH 24, 1976.

APPELLATE DIVISION OF THE SUPREME COURT
FIRST JUDICIAL DEPARTMENT

PRESENT:

Hon. FRANCIS T. MURPHY, *Presiding Justice*
Hon. THEODORE R. KUPFERMAN,
Hon. VINCENT A. LUPIANO,
Hon. HAROLD BIRNS,
Hon. SAMUEL J. SILVERMAN, *Justices.*

In The Matter of the

APPLICATION FOR MODIFICATION OF THE CERTIFICATE OF INCORPORATION OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

ORDER

[Filed June 8, 1977]

Upon reading and filing the petition of the N.A.A.C.P. Legal Defense and Educational Fund, Inc. for Modification of its Certificate of Incorporation, verified the 13th day of May, 1977, by Jack Greenberg, the Director-Counsel of petitioner, and upon motion of said petition and due deliberation having been had thereon, it is

ORDERED, that the application of petitioner for modification of its Certificate of Incorporation by adding the phrase "to an extent that would disqualify it for tax exemption under § 501(c)(3) of the Code" to the first sentence of ¶ 2(d) is granted.

ENTER
FOR THE COURT
/s/ Francis T. Murphy
FRANCIS T. MURPHY
Presiding Justice

Dated: New York, New York
JUNE 8, 1977

EXHIBIT "B"
INTERNAL REVENUE DOCUMENTS
TREASURY DEPARTMENT
WASHINGTON

April 30, 1940

N.A.A.C.P. Legal Defense and Educational Fund, Inc.,
69 Fifth Avenue,
New York, New York

Sirs:

Reference is made to the evidence submitted by you in support of your claim to exemption from Federal income taxation.

The evidence shows that you were incorporated March 20, 1940, under the Membership Corporations Law of the State of New York for the purposes generally of rendering legal aid gratuitously to worthy indigent Negroes suffering legal injustice by reason of race or color; promoting educational facilities for Negroes; and conducting research, and compiling and publishing facts and statistics concerning educational facilities and opportunities for Negroes. Your certificate of incorporation specifically provides that you shall not engage in any activities for the purpose of carrying on propaganda or otherwise attempting to influence Legislation and shall operate without pecuniary profit to your members.

The affidavit submitted to the Appellate Division of the Supreme Court of the State of New York for the purpose of obtaining its approval to your certificate of incorporation to be filed with the Secretary of State of the State of New York sets forth, among other things, that you intend to furnish funds for the purpose of engaging the services of an attorney or attorneys (a) to institute or defend legal actions in such cases where constitutional rights of indigent Negroes are involved; (b) to institute and defend such actions as will protect the rights of Negro citizens to vote, in order that such rights shall not be denied or abridged by the United States or by any State on account of race or color; (c) to secure to indigent Negroes the right to a fair and impartial jury trial; and (d) to maintain such legal actions as

may be necessary to contest any laws which tend to abridge the privileges or immunities of Negro citizens of the United States guaranteed by the Federal and the several State Constitutions.

Based upon the evidence submitted, it is held that you are entitled to exemption under the provisions of section 101(6) of the Internal Revenue Code (53 Stat., Part 1). You are not, therefore, required to file a return of income for 1940, and future returns will not be required so long as there is no change in your form of organization or method of operation.

If, however, your activities are not confined solely to carrying out the purposes as shown in your certificate of incorporation, if your income is not used exclusively for those purposes, or if any changes are made in your form of organization or method of operation, as shown by the evidence submitted, these facts should be immediately reported to the collector of internal revenue for your district, in order that the effect of such changes upon your present exempt status may be determined.

The exemption referred to in this letter does not apply to taxes levied under other titles or provisions of the Internal Revenue Code, except insofar as exemption is granted expressly under those provisions to organizations enumerated in section 101.

Contributions made to you by individual donors are deductible by such individuals in arriving at their taxable net income in the manner and to the extent provided by section 23(o) of the Internal Revenue Code, as amended by section 224 of the Revenue Act of 1939. The deductibility of contributions by corporations is governed by section 23(q) of the Internal Revenue Code, as amended by section 224 of the Revenue Act of 1939.

A copy of this letter is being transmitted to the collector of internal revenue for your district.

By direction of the Commissioner.

Respectfully,

/s/ . . Sherwood
Acting Deputy Commissioner

DEPARTMENT OF THE TREASURY
DISTRICT DIRECTOR
INTERNAL REVENUE SERVICE

October 26, 1973

N.A.A.C.P. Legal Defense and Educational Fund, Inc.
10 Columbus Circle
New York, New York 10019

Year(s) Activities Examined: 1971
Year(s) Form 990-T Examined:

Gentlemen:

After reviewing your activities and examining your financial records for the above year(s), we find that your Federal tax-exempt status continues. The return(s) for the year(s) indicated are accepted as filed.

Thank you for your cooperation.

SINCERELY YOURS,
DISTRICT DIRECTOR

DEPARTMENT OF THE TREASURY
DISTRICT DIRECTOR
INTERNAL REVENUE SERVICE

December 11, 1974

NAACP Legal Defense and Educational Fund, Inc.
10 Columbus Circle
New York, New York 10019

Gentlemen:

Reference is made to the December 9, 1974 letter from the firm of Paul, Weiss, Rifkind, Wharton and Garrison requesting verification of the Foundation status of your organization.

Our records indicate that the NAACP Legal Defense and Educational Fund, Inc., has been classified as an organization that is not a private foundation as defined in section 509(a) of the Internal Revenue Code because it is an organization described in section 509(a)(1) of the Code.

Very truly yours,
/s/ Milton G. Vodmann
MILTON G. VODMANN
Group Manager, Exempt Organizations

cc:
Adrian W. DeWind, Esq.
Paul, Weiss, Rifkind,
Wharton & Garrison
345 Park Avenue
New York, New York 10022

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

February 22, 1974

NAACP Legal Defense & Educational Fund, Inc.
10 Columbus Circle Suite 2030
New York, N.Y. 10019

Dear Sir:

Although contributions to your organization are deductible for Federal income tax purposes under section 170(c) of the Internal Revenue Code, we unintentionally omitted its name in the cumulative list of such organizations in Publication 78 (1-74), revised to October 31, 1973.

We will correct our error by including your organization's name in the quarterly supplement of Publication 78 that is due for issuance in April of this year.

We regret any inconvenience this may have caused you. If you have any questions, please contact the person named above.

Sincerely yours,
/s/ R. J. McCauley
R. J. MCCAULEY
Chief, Exempt Organization
Examination Branch

EXHIBIT "C"—DOCKET REPORT

N.A.A.C.P. LEGAL DEFENSE
AND EDUCATIONAL FUND, INC.
DOCKET REPORT
MARCH, 1980
[excerpts]

12—FEDERAL EMPLOYMENT

52—ALABAMA

86 *Jones* v. *Alexander*, S.D. Ala., Civ. Action No. 74-462-H (J.U. Blacksher; M. Baller; Bill Lee).

Suit under Title VII, alleging across-the-board discrimination by Army Corps. of Engineers, Mobile District. See also *McLaughlin* v. *Calloway*, *infra*. Jones, an architect denied promotion by Corps. sought to intervene in *McLaughlin* case. Upon denial of intervention, Jones sued in Nov. 1974. The district court initially refused to hear the case as related to *McLaughlin*. A motion to recuse Judge Hand for bias was denied and affirmed by the Fifth Circuit. In 1977, after the Fifth Circuit reversed the denial of class action consideration in *McLaughlin*, Mr. Jones' action was consolidated with the *McLaughlin* case.

ISSUES: Class action

CURRENT STATUS: Consolidated with *McLaughlin* v. *Alexander*. Trial set for November 1979.

87 *McLaughlin* v. *Alexander*, S.D. Ala., Civ. Action No. 74-123-P (J.U. Blacksher; Bill Lee).

Across-the-board Title VII action alleging racial discrimination in federal employment by Army Corps of Engineers, Mobile District. Plaintiff, a rejected applicant, sought to raise hiring, recruitment, classification, assignment, and promotion claims. Filed March 28, 1974. Court entered orders in Sept.-Nov. 1974: (1) denying trial de novo; (2) denying class action status; (3) denying class-wide discovery. The district court, however, ruled that Mr. McLaughlin prevailed on his individual claim. In 1977, the Fifth Circuit reversed the lower court, and ordered that plaintiffs were entitled to a trial *de novo*, to move for class certification and to engage in pretrial discovery. Plaintiffs

seek to correct discrimination at a variety of Corps of Engineer facilities in several states covered by the Mobile District. The parties are engaging in discovery for an evindentiary hearing on class certification.

On remand, the district court reconfirmed the class action certification and consolidated the case of several additional Corps of Engineers cases filed throughout the southern district of the Corps, including *Jones* v. *Alexander*, with *McLaughlin*. Case is now scheduled for trial.

ISSUES: Hiring, job assignment and promotions.

CURRENT STATUS: The case is now scheduled for trial in November 1979.

04—ARKANSAS

02 *Goldman* v. *Calloway*, E.D. Ark., Civ. Action No. PB-75-C-36 (Eugene Hunt, Ron Ellis).

This suit is against the Pine Bluff Arsenal, which employs about 1000 persons (1/3 black). Blacks typically predominate in wage grade jobs as laborers even some with college degrees. Middle and upper management (most G.S. jobs) are held almost exclusively by whites. WRF Grant.

ISSUES:

CURRENT STATUS: Awaiting pre-trial date.

05 *Perry* v. *Alexander*, E.D. Ark., Civil Action No. H-C-78-16 (Jimmie Wilson; Ron Ellis).

Filed as class action against Memphis district Corps of Engineers. Thirty-two black employees discharged for protesting working conditions. Investigation reveals blacks assigned to lowest job-revetment. Whites given better jobs, trained for advancement.

ISSUES: Discharge, Assignment, Promotions.

CURRENT STATUS: In discovery. First interrogatories answered.

03 *Smith* v. *Klassen*, E.D. Ark., Civ. Action LR-73-C-107 (Les Hollingsworth, Ron Ellis).

ISSUES: This case challenges the subjective promotional practices of the U.S. Postal Service in Little Rock. Very few blacks hold promotions at grade 10 or above. WRF Grant.

CURRENT STATUS: Awaiting class action ruling.

01 *Watson* v. *Calloway*, Ark., Civ. Action No (John Walker, Ron Ellis).

Action challenges the exclusion of Blacks from membership in any selection for technical jobs in Arkansas Army National Guard. Only 10 of 921 technicians are minorities. WRF Grant.

ISSUES:

CURRENT STATUS; In discovery.

04 *Williams* v. *Califano*, E.D. Ark.—Pine Bluff, Civ. Action No. PN-76-C-161 (Eugene Hunt, Ron Ellis).

The National Center for Toxicological Research was taken over by HEW from the Army in 1971. There are 500 employees. The installation contracts with the University of Arkansas Medical Center for Laboratory services and with some private businesses for supportive services. This action challenges hiring, assignment and promotional practices. WRF Grant.

ISSUES:

CURRENT STATUS: In discovery.

05—CALIFORNIA

05 *Saunders* v. *Claytor*, 9th Cir. (Howard Moore; S. Ralston).

Government appeal from good aard of back pay and inflaction factor and counsel fees.

ISSUES:

CURRENT STATUS: Fully briefed, waiting argument.

09—DISTRICT OF COLUMBIA

75 *Barrett* v. *Civil Service Commission*, U.S.D.C., Civ. Action No. 74-1694 (Elaine R. Jones, C.S. Ralston, G. Wright).

Action against the Civil Service Commission to compel federal agencies to accept, process and dispose of individual complaint of unlawful discrimination against federal agencies as class actions. Also, an action against the Johnson Space Flight Center, in behalf of incumbent black

employees to eliminate obstacles to minority advancement within that installation. The first issue was resolved in our favor—69 F.R.D. 554.

ISSUES: Whether Civil Service Commission must process individual complaints as class actions. Whether Johnson Space Flight Center discriminates against blacks in promotions.

CURRENT STATUS: Settlement on class issues approved June 4, 1979. Still to be resolved are individual claims and counsel fees.

04 *Harrison* v. *Maritime Administration*, U.S. Civil Service Commission, Civ. Action No. 003 (Valerie V. Ambler; Charles Stephen Ralston).

Class action administrative complaint filed under new CSC regulations on behalf of Blacks and women employees of Maritime Administration Hdq., in Washington, D.C. Attacks discrimination in hiring, promotion, supervisory ratings, etc.

ISSUES: Across the board attack on employment practices.

CURRENT STATUS: Administrative process exhausted; complaint to be filed in district court. (Class certified, discovery proceeding.

09—DISTRICT OF COLUMBIA (cont'd)

03 *Luevano* v. *Campbell*, D.D.C., Civil Action No. 79-0271 (Jolin Borscon, Alice Beasley, Richard Seymour, Mike Baller, Eva Patterson, Russell Galloway, C.S. Ralston, Gail J. Wright, Barry L. Goldstein, Patrick O. Patterson).

Title VII action challenging the PACE Exam, the chief entry level exam for professional, administrative and technical positions in the federal government.

ISSUES: Whether test has adverse impact and is validated under current guidelines.

CURRENT STATUS: Near settlement.

05 *Nelson* v. *Campbell*, D.D.C., Civ. Action No. 77-2129 (Valerie v. Ambler; Percy Julian; Charles Stephen Ralston).

Action under Title VII and Equal Pay Act on behalf of woman employee of Dept. of Agriculture. LDF involvement limited to challenge to deficiencies in CSC regulations that bar, on procedural grounds ("not within purview" rules), a challenge on the merits to classifications.

ISSUES: Legality of CSC regulations that interfere with processing of EEO complaints.

CURRENT STATUS: Case settled by means of limiting interpretations of the regulations in question. Motion for counsel fees pending.

10 *Smith* v. *Califano*, D.D.C., Civ. Action No. 76-2311 (Roma Stewart, Bill L. Lee).

This is a federal Title VII action in which LDF filed an *amicus curiae* brief in support of a black federal employee's request for an award of attorneys' fees in administrative Title VII proceedings. Plaintiff Smith recovered backpay and retroactive promotion, but was denied fees. The lawsuit was filed to recover fees. In January 1978, the district court decided that the agency was required to grant fees. 446 F. Supp. 530 (D.D.C. 1978). The government, however, has failed to come up with procedures, and no fees award has been determined.

ISSUES: Attorney's fees.

CURRENT STATUS: Attorneys' fees pending.

04—FLORIDA

84 *Griffin* v. *United States Postal Service*. M.D. Fla., Civ. Action No. 72-487 Civ.-J.T. (W.B. Kyle, G. Wright,).

Complaint filed July 7, 1972 alleging that Jacksonville Post Office discriminates against black postal workers in promotional practices and disciplinary procedures. Defendant's assignment, motion to dismiss concerning class action, certification, and timeliness of the complaint are pending. Because of lack of judicial manpower and retirements, this case remained inactive for several years. In January 1978

the action was assigned to a newly-appointed federal district judge. Due to new developments in the law, the court ordered filing of supplemental briefs. All arguments were heard in October and November of 1979. Supplemental complaint filed subsequent to plaintiff's discharge in December 1976.

ISSUES: Assignment, promotion, discipline, harassment and discharge.

CURRENT STATUS: Motion to Dismiss pending decision.

86 *Moran* v. *Naval Air Station*, M.D. Fla, Civ. Action No. 73-702-Civ.-J-S (E. Johnson; W. Kyle; Clyde Murphy).

Class action. Discriminatory assignments and promotion methods; written tests; unequal pay for same work. Relief: Declaratory judgment, injunction, affirmative action. Briefs have been submitted and argument has been held on defendants' renewed motion for summary judgment.

ISSUES:

CURRENT STATUS: Defendants renewed motions to dismiss, for summary judgment and to dismiss nonperfecting named plaintiffs denied. Discovery reopened, however several motions re: discovery are pending. Hearing on class actions status also pending.

11—GEORGIA

01 *Howard* v. *McLucas*, M.D. Ga., Civ. Action No. 75-168-Mac (B. Turner, Bill Lee).

This across-the-board attack on racial discrimination in employment practices at the Robins Air Force Base near Macon, Georgia was filed October 1975. The complaint alleges, *inter alia*, that only 4% of GS employees are black and that black employees are disproportionately underrepresented at high level jobs and overrepresented at low level jobs. In 1976, the district court resolved various procedural and jurisdictional issues in favor of permitting

plaintiffs to proceed with discovery and prepare for a trial *de novo*. The court also certified the case as a class action composed of black employees and applicants for employment. Because the class of black employees and applicants is provisionally defined as at least 3,500 incumbent employees, the discovery process, including computer has been onerous discovery.

ISSUES: Promotion; hiring; job assignment.

CURRENT STATUS: This case is now in discovery.

03 *Maddox* v. *Claytor*, M.D. Ga., Civil Action No. 78-2-ALB (Herbert Phipps, C.B. King, Bill Lann Lee, G. Wright).

This is a federal Title VII action against the Marine Corps logistics Support Base in Albany, Georgia filed in January 1978. The case is brought on behalf of about 400 black employees and an indefinite number of applicants and concerns hiring, promotion to higher level jobs, job assignment and disparate treatment. Black employees have generally been closed out of upper level jobs, supervisory positions and white collar categories, and, instead, are relegated to low-level blue collar occupations.

ISSUES: Promotions, hiring, job assignment, disparate treatment.

CURRENT STATUS: In discovery, class action certification granted December, 1979. Defendants have filed for reconsideration.

14—ILLINOIS

01 *Thompson* v. *Roudebush*, N.D. Ill, Civ. Action No. 74-C-3719 (M. Miner; Bill Lee).

This Title VII action concerns classwide policies and patterns of discrimination at a Veterans Administration hospital in Chicago. The action has been certified as a class action and is ready for trial.

ISSUES: Promotions; job assignments.

CURRENT STATUS: Trial won on the merits in 1979. Counsel fees awarded.

22—MASSACHUSETTS

02 *Bradley K. Beasley* v. *William Griffen, et al.*, Dist. Mass. (Jonathan Shapiro, Anne Goldstein, Gail J. Wright).

Lawsuit instituted on January 13, 1975 alleging racial discrimination with respect to promotions; reliance on non-job related tests and criteria including Federal Service Entrance Examination (FSEE); complaint amended on March, 1976 to include recruitment, hiring, job placement and assignments.

ISSUES:

CURRENT STATUS; Settlement agreement formulated to include general declaratory, injunction and affirmative relief. Retroactive hiring and promotions; and back pay awards to class members. Counsel fee application filed.

24—MINNESOTA

01 *Nelson* v. *Bergland*, U.S.D.C., Civ. Action No. 6-78-10 (Valerie V. Ambler, Percy L. Julian, Delores Orey, Charles S. Ralston).

Action under Title VII and Equal Pay Act on behalf of woman employee of Dept. of Agriculture who alleges she has been classified lower than men doing the same work.

ISSUES:

CURRENT STATUS: Settled. Counsel fees being negotiated.

25—MISSISSIPPI

01 *Stubbs* v. *Middendorf*, S.D. Miss., Civ. Action No. S-76-178(C) (J. Hudson; Bill Lee).

This is an across-the-board federal Title VII action brought against the U.S. Naval Construction Battalion Center in Gulfport, Mississipi. Mr. Stubbs is a black employee in Supply Department who was denied a promotion that went to a white employee who was a relative of the supervisor. The Center has principally confined black blue collar employees to the Supply and one other department, and to low-level, low-paying jobs. There are almost no black white-collar employees in 1977, the lower court denied a motion for class certification, and an appeal was taken to the Fifth Circuit.

The appeal was voluntarily dismissed after intervening Supreme Court decision removed any basis for appeal jurisdiction. Trial preparation is underway, as is an effort to have the court reconsider the denial of a class action.

ISSUES: Promotions; job assignment; hiring; discipline.

CURRENT STATUS: Tried. Unfavorable ruling Feb., 1979.

34—NORTH CAROLINA

83 *Chisholm* v. *United States Postal Service*, W.D.N.C., Civ. Action No. C-C-73-148 (J. Wallas; Bill Lee).

Class action involving across-the-board promotional issues at Charlotte, N.C. Post Office. On May 29, 1975, Judge MacMillan ruled that (1) a trial de novo was required, (2) a class action could be maintained, and (3) intervention by employees who had not exhausted administrative remedies would be allowed. Judge MacMillan also certified these questions appropriate for an interlocutory appeal to the Fourth Circuit. Late in 1977, the Fourth Circuit granted the motion to dismiss the apeal in light of the government's withdrawal of its position against class action certification and intervention. The Supreme Court in 1976 had ruled in favor of trials *de novo* in *Chandler* v. *Roudebush*, in which LDF was amicus.

The case was tried in August 1979. The court ruled from the bench that plaintiffs had prevailed on all issues, *i.e.*, promotion to higher level and supervisory jobs, initial level supervisory tests, details and disparate discipline. The court requested that the parties negotiate as to relief in light of the preliminary ruling. Otherwise, the court would write an opinion and impose relief.

ISSUES: Promotions to supervisory and upper level jobs, details, discipline.

CURRENT STATUS: Pending on relief.

81 *Mackey* v. *Stetson*, W.D.N.C., Civ. Action No. C-C-77-124 Louis L. Lesesne, Jr. Bill L. Lee).

This federal Title VII class action was brought by a black civilian employee and an applicant for employment at the

North Carolina Air National Guard. The action concerns across-the-board patterns and policies of racial discrimination in employment, but principally deals with discriminatory hiring and promotion policies. The district court denied defendant's objections to our discovery requests in December 1977, and discovery is in process.

ISSUES: Hiring, promotions, job assignments.

CURRENT STATUS: In discovery.

37—OKLAHOMA

01 *Salone* v. *United States*, [. . .] Civ. Action No. [. . .] (S. Ralston)

Appeal from denial of full back pay and attorneys fees.

ISSUES:

CURRENT STATUS: To be briefed.

43—TENNESSEE

01 *Williams* v. *Tennessee Valley Authority*, M.D. Tenn., Civ. Action No. 75-186 (A. Williams; S. Ralston).

This is an across-the-board attack on hiring and other policies of T.V.A. installations in Tennessee. The District Court held that plaintiffs were entitled to a trial *de novo* and a class action; affirmed by the Sixth Circuit.

ISSUES: Hiring and promotion policies for blue collar workers at T.V.A. installations.

CURRENT STATUS: Pending class action determination in the District Court.

44—TEXAS

79 *Lewis* v. *NLRB*, S.D. Tex., Civ. Action No. 76-H-70 (M. McDonald; Gail J. Wright).

This is a federal Title VII action against the regional offices of the National Labor Relations Board for discrimination on the basis of race against black professional employees, including attorneys and field examiners. The named plaintiffs, a black field examiner, employed by the NLRB Houston regional office was denied a promotion due to the NLRB's limitation on the number of middle level staff, al-

though similarly situated white employees have been promoted. This suit followed in 1976. In 1977, the lower court denied objections to classwide discovery. In September, 1979, the court certified nationwide class action to include all past and present Black field examiners, field attorneys.

ISSUES: Hiring; job assignment; promotions; discipline; retaliation.

CURRENT STATUS: Nationwide class certified. Discovery in progress.

47—VIRGINIA

44 *Simmons* v. *Brown*, E.D. Va., Civ. Action No. 74-0268-R (H. Marsh; R. Johnson; Gail J. Wright).

This across-the-board attack on racial discrimination in employment practices at the Norfolk Naval Air Rework Facility under Title VII was filed June 1974. The district court granted a trial de novo but denied the class action and broad discovery. A decision against the named plaintiffs on their individual claims was issued July 1975. An appeal was taken on issues (1) class action; (2) discovery; and (3) merits of individual claims.

In December 1976, the Fourth Circuit ruled against plaintiffs on the appeal. On a petition for rehearing, the government changed its position on class actions twice and eventually confessed error and joined in plaintiffs' request that the case be sent back to the lower court. Thereafter, in October, 1977, the Fourth circuit vacated its prior adverse decision on class action certification and discovery. The adverse decision on the individual claims was to remain in effect pending further proof and result of further discovery and trial proceedings.

On remand, plaintiffs conducted class wide discovery and filed a motion to certify a class. In May, 1979 the district court declined to consider whether the requirements of Rule 23 had been met on the grounds that the named plaintiffs had failed to move to have their individual claims reconsidered. Plaintiffs filed a second appeal on the issue and oral argument was heard before the Fourth Circuit in June, 1978.

ISSUES: Class Action, Promotion, assignment.

CURRENT STATUS: December, 1979 reversal by Fourth Circuit, remanded for identification of new class representatives.

VI. 14—EQUALIZATION OF MUNICIPAL SERVICES

25—MISSISSIPPI

05 *Fredericks* v. *Kreps*, S.D. Miss., Civ. Action No. (Joe Hudson, Eric Schnapper).

Did rejection of grant application for storm drains in black neighborhood violate provisions of Public Works Act.

ISSUES:

CURRENT STATUS: Preliminary injunction denied, on appeal to the Fifth Circuit. Lost in Fifth Circuit.

VII. 20—HEALTH

33—NEW YORK

01 *Bryan* v. *Koch*, S.D.N.Y., Civ. Action No. (Ira Bezona, Beth Lief, O.P. Sherwood).

Class action on behalf of poor blacks and hispanics challenging continuation of cut-back and closings of municipal hospitals.

ISSUES: Whether City & HHC's attrition program and plans for closings of public hospital violates Title VI and Fourteenth Amendment.

CURRENT STATUS: Complaint field 8/15/79. Motion for class action status filed.

15—INDIANA

04 *Hatcher* v. *Methodist Hospital of Gary, Ind.*, U.S.D.C., N.D. Inc., Civ. Action No. 77-154 (J. Allen, B. Lief).

ISSUES:

CURRENT STATUS: Case against hospital settled for, *inter* alia: $20 million construction program to upgrade and expand black hospital, more black representation on Board of Directors, equality of staffing in numbers and training at both hospitals; all

new services to be put in Ga.. hospital; outreach program into black community for primary care, etc.

Motion for attorneys' fees to be filed shortly.

03 *Wesson* v. *Methodist Hospital of Gary, Indiana*, U.S.D.C., N.D. Ind. Civ. Action No. 76-373 (Julian Allen; B. Lief).

These class actions suits challenge the construction and expansion of a hospital in a suburban all-white town 15 miles south of Gary, Indiana, by Methodist Hospital of Gary, Inc., a corporation which has operated a hospital in Gary since 1923. The suit alleges that the construction of the hospital has had the purpose and effect of creating a segregated, discriminatory health care system that harms the minority and handicapped residents of Gary, a city which is 63% minority.

The suit also names local and state health agencies and HEW and charges them with violating Title VI of the Civil Rights Act by funding and approving the construction of the all-white hospital.

The complaint seeks not only to upgrade the inner-city facility but to force HEW to establish policies to prevent violtions by hospital facilities of title VI.

ISSUES: Whether construction and expansion of a "satellite" hospital in a white suburb by a corporation which has a hospital in aminority urban area violates Fourteenth Amendment and Title VI of Civil Right Act of 1964 and Section 504 of Rehabilitation Act of 1973 (discrim. against handicapped); whether funding by HEW of construction and expansion and failure to enforce civil rights acts violates HEW's obligation under Title VI and Section 504.

CURRENT STATUS: Motions to dismiss denied; motion to consolidate with *Hatcher* v. *Methodist Hospital* granted; class determination granted as to class of blacks; discovery complete. Trial scheduled for April 24, 1978.

VIII. 21—LAND USE

26—MISSOURI

01 *Citizens Environmental Council, et al.* v. *Coleman, et al*, W.D. Mo, Civ. Action 73-CV 349-W-1 (Kansas City

Legal Aid Society; James A. Kushner; J. Nelson Thompson; J. Gary).

Suit to prevent the South-Midtown Freeway from being constructed. The Freeway has disrupted Kansas City's racially integrated communities, isolated some black communities and dislocated many residents without adequate relocation provisions. After forcing defendants to prepare a proper environmental impact statement, (E.I.S.) the question of the adequacy and validty of said EIS is at issue as well as the relocation plans.

ISSUES:

CURRENT STATUS: Preparing for trial in July 1978.

1978-79 ANNUAL REPORT
NAACP LEGAL DEFENSE FUND

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INTRODUCTION

As the 1970's come to a close, the condition of black Americans, improved in some respects since the Civil Rights Movement of the 1960's, continues to be the nation's most urgent human rights concern. Indeed, one serious aspect of the problem is that some improvements have occurred, giving rise to belief that further national effort is not necessary. We have, therefore, entered a period of stagnation and regression with regard to civil rights. Because crime, welfare, decline of the cities, and a host of socially dislocating pathologies stem directly from the deprived condition of certain minorities—among whom blacks are most numerous—the issue is one for all Americans.

Black median income persists at the level of 60% of white median income. Black unemployment remains a steady double of white unemployment. Blacks are three times more likely to be below the poverty level as whites. While between 1968 and 1977 black males entered the managerial classes at a rate which has grown from 3.3% to 8.1%, and black families with two wage earners under age 35 living in the Northeast (under 6% of the black population) now earn about the same as whites, the unwavering median income statistic indicates that other blacks are doing worse than before.

Even though *Brown* v. *Board of Education* was decided in 1954, school integration did not really begin until 1970 when the Supreme Court stuck down the "deliberate speed" doctrine, and also announced principles which would require Northern school integration. In the past ten years, Southern rural and small town schools have become well integrated and Southern big city schools have been somewhat integrated. Elsewhere segregation is the norm. The growth of private schools and Supreme Court decisions which deny integration relief across school district boundaries, have limited change. Even more formidable an obstacle has been political opposition to school integration, expressed in innumerable HEW appropriation riders. Nevertheless, some encouraging indicators are a recent Rand Corporation study which demonstrates that school integration improves

academic achievement of black students, while having no particular effect on whites, and a Louis Harris survey which shows that while most whites oppose busing, and blacks are evenly divided, among both groups whose children have been bussed, the overwhelming view is that the experience was favorable. Further progress in integrating the great number of segregated schools can be achieved, but only with effort. Of course, housing segregation discussed below, is a formidable obstacle to changing the school picture.

As to higher education, gains in black enrollment are a function of (1) improved and integrated education at lower levels and (2) affirmative action. While the former is at a standstill, the latter has been threatened by "*Bakke*" type attacks. The Chronicle of Higher Education reports that while total college enrollments this year dropped 3.5%, the number of black students dropped 7.5%, and the number of Hispanics dropped 9.8%. Thomas Pettigrew in a recent report for the Rockefeller Foundation concluded that "there are numerous indications that the *Bakke* ruling has had some negative, though by no means crippling consequences ... Whether these effects will cumulate in time into a significant chilling effect must await further experience under *Bakke* and later, more intensive follow-up research."

On a variety of fronts—involving issues other than those referred to—great effort continues to be required to achieve educational equality.

Housing remains essentially racially segregated. The United States Commission on Civil Rights reports that "the decade of the 1960's did little to increase the similarity in residential location between the majority- and minority-headed households." Moreover, minority housing tends to be more overcrowded than white housing, and minorities disproportionately spend an excess percentage of their income for rent. The disparity was especially great for female-headed households and increased through the 1960's.

Employment, housing, education: this triad remains basic. No one of them can be meaningfully improved unless we correct the others at the same time. Following is a report on significant developments in the Legal Defense Fund program in 1978/79.

JULIUS LEVONNE CHAMBERS
President

JACK GREENBERG
Director-Counsel

October 1979

EMPLOYMENT DISCRIMINATION

LDF wins $5 Million in Back Pay for Black Workers

Over $5,000,000 has been distributed among thousands of black workers in settlements won by LDF between October 1978 and July 1979. The settlements came in 18 cases involving discrimination against black workers in employment policies and practices. No other organization can come close to this record. In addition to winning back wages, LDF has won for these and others much larger wages for the future, substantial changes in systems which perpetuated discrimination, modifications in hiring procedures. promotion and seniority systems, and working conditions which insure that blacks and other minorities be given equal job opportunity.

The 18 cases include settlement of suits against Norfolk and Western Railway and the United Transportation Union, Fieldcrest Mills and Scott Paper Company. In these three cases the courts awarded back pay in excess of $3,000,000. *Rock* v. *Norfolk and Western and the United Transportation Union* calls for payments of $1,125,000; *Gallaway* v. *Fieldcrest Mills*, $1,100,000 in back pay; *Watkins* v. *Scott Paper Co.*, $750,000 in back pay to present and former employees. These companies and unions were required to amend their seniority systems to end present discrimination to adjust the status of victims of past discrimination.

In a public employment case settlement, one Court approved $320,000 in back pay for police officers and fire fighters in *Tarner v. City of Houston*. The city must revise its standards of hiring to eliminate the disparate impact former employment standards had on minorities. In addition, all previously-rejected applicants have been invited to reapply and age limits are being waived to accomodate these applications. The settlement affects between 5,000 and 10,000 blacks denied employment in the past.

Recent settlements have been encouraging in the face of what appeared to be defeat in the Supreme Court's 1977 decision, *International Brotherhood of Teamsters* v. *U.S.* which required proof of "intent to discriminate" by an em-

ployer to establish that a seniority system is illegal. The limited effect of *Teamsters* is due to the careful preparation for, and selection of, cases by LDF staff. In LDF's case, *James* v. *Stockham Valves*, the U.S. Court of Appeals for the Fifth Circuit has clarified the discriminatory seniority issue and provided criteria for judging the validity of seniority systems. These include whether the system discourages all employees from transferring, whether seniority units are in the same or separate union bargaining units, whether the system had its genesis in racial discrimination, and whether it was negotiated and has been maintained free from any racial discrimination.

The equal employment litigation program—including over 200 active cases—continues to command the major portion of the resources of the Legal Defense Fund. In all during the past twelve months, LDF had 13 cases in various stages in the district courts and twenty-two in the courts of appeal; we will go to trial in district courts in five additional cases within the next two months. Two cases in which we filed *amicus curiae* briefs—*County of Los Angeles* v. *Davis and Kaiser Aluminum Co. v. Weber*—were decided in our favor by the U.S. Supreme Court.

Public Employment

Our policy of concentrating Title VII efforts in expanding industries carries over to the public employment field. Federal, state and local governments are among the nation's highest growth areas in terms of jobs. It is in government cases that we represent large numbers of "white collar" workers, although some also involve "blue collar" jobs. We are proceeding with class actions involving such diverse agencies as regional offices of the National Labor Relations Boards nationwide, the Washington headquarters of the Maritime Administration, Naval Air Rework Facilities in Norfolk and Jacksonville, post offices in Houston, Charlotte and Jacksonville; and the massive Warner Robbins Air Force Base in Macon. These cases challenge standards and policies that have prevented blacks and other minorities from being hired and promoted in the federal service on a nondiscriminatory basis.

A major and significant case was added to our docket in January with a legal challenge to the present Professional and Administrative Career Examination (PACE) which, in most cases, is the single determining factor in considering applicants for thousands of professional, administrative and technical jobs in a large number of federal agencies. We charge that PACE has so severe an adverse impact on blacks, Hispanics and other racial minorities that it threatens to segregate the middle levels of the executive branch of the federal government. We filed suit jointly with the Lawyers Committee for Civil Rights Under the Law, the Mexican-American Legal Defense Fund, and IMAGE de California, an association of Hispanic federal and state employees.

On the local government level, LDF has won a case on behalf of black officers and applicants to the Louisville police force. In *Louisville Black Police Officers* v. *City of Louisville*, the U.S. District Court for the Western District of Kentucky ruled that the City had used discriminatory hiring practices and ordered the City to appoint at least one black officer for every two whites appointed during the next five years.

A further significant development occurred during the past year. For the first time, an LDF federal Title VII case went to trial on the merits. In *Chisholm* v. *United States Postal Service*, the judge ruled from the bench at the completion of trial that the plaintiffs had proven discrimination against black workers at the Charlotte, North Carolina post office. Both sides are attempting to effect an agreement on the remedy.

Civil Service Reform

For a number of years LDF has been extensively involved in attempts to bring about reforms in the federal civil service system. Efforts have included litigation under the equal employment opportunity provision (Title VII) of the Civil Rights Act charging discrimination against a number of federal agencies, and litigation and other attempts to bring about reforms in the procedure under which federal employees are able to bring and pursue discrimination com-

plaints. In two cases the Legal Defense Fund was successful in bringing about significant revisions in the Civil Service Commission's administrative procedures. One reform insures that complaints that had been rejected on procedural grounds would, in the future, be adjudicated on their merits; another; that the system would follow Title VII law with regard to granting back pay in cases where there had been a finding of discrimination.

Early in 1978, the President announced Reorganization Plan No. 1, which shifted authority over federal employee Title VII claims to the Equal Employment Opportunity Commission (EEOC) and introduced reforms in the civil service system, including the Civil Service Reform Act. This Act abolished the Civil Service Commission and divided it into the Office for Personnel Management and a new adjudicatory body, the Merit System Protection Board. In Congress, attempts were made to divest the EEOC of some of its new jurisdiction over federal employee cases and give it to the Merit System Protection Board. The Legal Defense Fund staff, through its Washington office, worked closely, and successfully, with Congressional committees to develop a compromise bill which would insure that the EEOC would retain primary jurisdiction over all employment discrimination claims involving federal employees.

AFFIRMATIVE ACTION

In the 12 months since our last report, affirmative action was a dominant public issue, particularly for those of us concerned with civil rights. But unlike the *Bakke* case decided by the Supreme Court in June, 1978, the Court's 1979 decision in *Kaiser Aluminum and Chemical Corporation* v. *Weber* was a clear and major victory that opens wide the door for affirmative action programs in employment. The decision in *Weber*, in which the Legal Defense Fund, the National Urban League and Howard University jointly filed an *amicus curiae* brief, provides a legal basis for LDF and others to successfully meet legal challenges to voluntary affirmative action in employment.

In its 5-2 decision on June 27, the Court rejected the argument of Brian F. Weber, a white worker, that a training program designed by Kaiser Aluminum and the Steel Workers Union to increase the number of blacks in skilled-craft jobs constituted unlawful "reverse discrimination". The decision not only eliminates a whole area from the prospect of litigation but also removes a major obstacle to compliance with affirmative action mandates.

The *Weber* decision will undoubtedly have a positive impact on several pending cases involving affirmative action in employment. The two leading cases involve the City of Detroit and are being handled by LDF. In one, we were victorious in the trial court when the affirmative action plan adopted by Detroit Mayor Coleman Young to increase the number of blacks holding the rank of lieutenant in the City's Police Department was judged "reasonable," . . . "appropriate" and "fair" overall by U.S. Circuit Judge Damon J. Keith sitting in the U.S. District Court for the Eastern District of Michigan. This is the so-called lieutenants' case which was tried in Detroit from August 1978 to January 1979. The case is one of two brought by the white-dominated Detroit police officer union charging that the Mayor's plan constituted "reverse discrimination." The Court disagreed, saying that the plan must be viewed not as a deprivation of white police officers but as a benefit for blacks who were victims of past discrimination by the Police Department. The October 1st decision calls for the Detroit Board of Police Commissioners to review its plan—which had been halted as a result of the challenge—and to establish an end goal either by fixing percentages or setting a time frame for completion. The Court will review the Board's proposal for reasonableness.

Prior to LDF's involvement, the other case, known as the sergeants' case, was lost by the City in trial court. LDF represented the City on the appeal which was argued on June 12th and is pending decision before the U.S. Court of Appeals for the Sixth Circuit. The two cases could be highly influential in determining the direction of affirmative action policies in municipal employment.

In another area, the Legal Defense Fund was asked in May 1979 by the City of New York to work with their representatives to develop an affirmative action policy governing areas of employment and contracts. The City seeks our advice in promulgating uniform rules for affirmative action governing the awarding and enforcing of city contracts and in establishing a legal framework for *Weber*-type affirmative action in city job-training programs. LDF staff attorneys are providing counsel.

Another aspect of affirmative action will be decided next term in a case before the Supreme Court, *Fullilove* v. *Kreps*, in which LDF is filing an *amicus* brief. LDF is defending the right of Congress to "set aside" a fixed percentage of government funds for minority firms to remedy the effects of past discrimination in the construction industry.

Education: Post *Bakke* Assessment

In the area of education there is still evidence that affirmative action is deterred, in part, by *Bakke*-type attacks. The LDF staff has begun a review of the nature and quality of affirmative action programs which law schools have instituted following *Bakke*. We have been examining the admissions programs of a large number of law schools to attempt to determine if they have abandoned their affirmative action goals or curtailed efforts to adopt affirmative action for minorities to an extent greater than required by *Bakke*. We are concerned by the fact that there seems to be serious discrepancies between the *reported* versus the *actual* numbers of minorities admitted to universities and professional schools. We will measure the extent to which the under-enrollment of minorities has occurred to determine the degree to which it can be attributed to *Bakke*. We have also found that the universities and those within them who wish to advance affirmative action programs remain unsure of what exactly is required. We have provided counsel in these instances and will continue to do so.

Those who oppose affirmative action in any form have not given up, perhaps, in part, because the Supreme Court has yet to deliver a definitive opinion on the question. We have been working to move the Court to an across-the-board rat-

ification of affirmative action. We are doing this by intervening in cases, on behalf of blacks, that we believe will result in building the substantive law needed to establish a baseline for all affirmative action programs.

WASHINGTON, D.C. OFFICE

The Tax Reform Act of 1976 permits organizations like the Legal Defense Fund, for the first time, to engage in lobbying within specified limits. Because many of the issues in which LDF is interested are susceptible to legislative as well as courtroom efforts, LDF two years ago established a legislation office in Washington. This office has emerged as one of the most significant civil rights forces on Capitol Hill. Headed by LDF Assistant Counsel, Elaine Jones, its principal areas of concern are: (a) proposed legislation which affects the operation of the courts and (b) legislation which affects civil rights which LDF litigates to protect, whether that right is created by statute or protected by the Constitution of the United States.

One example of an issue which engaged our attention and in which we prevailed during the past twelve months concerns a proposal in the U.S. Senate to divide the Fifth Circuit Court of Appeals where LDF has a significant number of cases. Mississippi Senator James O. Eastland tacked a provision onto a federal judgeship bill which would have created two courts of appeal from the present six-state Fifth Circuit. The division would have carved out of the present, moderate bench a far more conservative body for the Southeastern states. The new circuits would have divided along geographical lines with the two states of Louisiana and Texas creating a new circuit and the four states of Georgia, Louisiana, Mississippi and Florida creating a new Deep South Circuit.

The "split" had already passed the Senate when LDF began its legislative activity in 1977. By October 1978, LDF—concentrating efforts in the House Judiciary Committee—had coordinated the opposition and marshalled support from other groups and from supporters in the Fifth Circuit states. During the six-month Conference between

the Senate and the House, LDF staff worked with both Houses, succeeding at the end of the year in having the Eastland proposal defeated.

The Washington D.C. Office insures that those issues that are susceptible of being corrected in the Congress will be addressed there as well as through litigation.

ADMINISTRATION OF CRIMINAL JUSTICE

Cruel and Unusual Punishment

Progress and advances in the law were tempered and severely undercut by the execution of John Spinkellink in Florida. John Spinkellink had been represented by the Legal Defense Fund for most of the six years he spent on Death Row. His death, in the words of LDF Director-Counsel Jack Greenberg, was "an outrageous combination of inhumanity, stupidity and superstition." In a statement issued following the execution, Mr. Greenberg pointed out that John Spikellink's crime was no worse than tens of thousands for which lesser penalties regularly are imposed and that Spinkellink's accomplice in the crime is free. Mr. Greenberg has compared the treatment given John Spinkellink, who murdered an acquaintance by whom he had been brutally assaulted, with that of the former San Francisco Supervisor who murdered the City's Mayor and another Supervisor in cold blood. Spinkellink was executed but the Supervisor received a sentence of less than eight years.

Since the State of Florida has approximately 130 inmates on Death Row, the Governor's promise to make such executions "routine" could result in Florida surpassing South Africa, equaling Iran and approaching the Soviet Union in legalized killing.

Despite this very serious setback our commitment to the campaign against the death penalty remains strong. We are continuing to develop social science evidence to prove that, in its application, the death penalty, is meted out in an arbitrary and capricious manner falling with significantly greater frequency on poor and minorities. We also represent 50-60 inmates, directly and indirectly, as counsel or co-

counsel. Efforts are concentrated now in states with the greatest number of inmates who are most likely to be executed. In countless other cases nationwide we are helping devise legal strategy, making our legal research available to other counsel, preparing and filing last minute appeals and assisting in drafting briefs. We continue to look for new arguments to press the attack on the constitutionality of state laws that have not yet been tested and to work on related procedural issues such as the fairness and composition of juries in capital trials.

Prison Reform

In the past twelve months there has been an increase in our involvement with prison reform cases. *Guthrie* v. *Ault*, first filed in 1973, is LDF's case against the Georgia State Prison (GSP) at Reidsville. In 1978 we secured several consent orders concerning the rights of GSP inmates including the cessation of racial discrimination and brutality at the prison, reduction of overcrowding, improvement of physical conditions, provision of law and regular library services, and the right to religious services and pork-free diets for Black Muslim inmates. LDF also won a court order desegregating the prison and requiring the construction of single cells so that the prisoners may be adequately protected from one another. In 1979 we obtained the appointment of a Special Monitor to assist the court in overseeing and enforcing compliance with the previously-won orders. A collateral benefit of the case has been the approval by the Georgia legislature of the construction of a new prison hospital facility to better serve the medical needs of the Georgia prisoners. LDF continues to press for improvement in the provision of medical services at the prison itself.

Ruiz v. *Estelle* is a challenge to the conditions of confinement in the Texas prison system. It was tried before Judge William Wayne Justice in Houston. LDF and U.S. Justice Department attorneys have introduced volumes of evidence regarding the brutality, overcrowding, poor medical care and other inhumane conditions in the Texas prison system.

LDF has also been increasingly active in the courts of appeal and the Supreme Court particularly in cases dealing with pre-trial detention. The rights of those awaiting trial, still presumed innocent, had been expanded by the courts since the late 1960s when LDF's case, *Jones* v. *Wittenberg*, established that the "least restrictive" detention should apply to pre-trial detainees. The application of this principle received a setback in the recent Supreme Court decision, *Bell* v. *Wolfish*, which held that detainces had only the right not to be punished. The decision upheld several practices such as routine body cavity searches which undermine the decade-old precedent that pre-trial detainees have greater rights than those who have been convicted of a crime. In an effort to limit the retrogressive effect of *Bell* v. *Wolfish*, we are actively involved in several cases. We have filed a brief as friend-of-the-court in a similar case involving an appeal of a district court decision upholding the right of detaines to have "contact" visits with their spouses and children, i.e, to be able to touch and have physical contact during visits.

HOUSING

The effort to find an effective way to identify and correct discrimination in housing is developing slowly and against great obstacles. Progress is severely limited because the federal Fair Housing Law, lacking an enforcement mechanism, has not realized its full potential. Another part of the problem stems from the fact that many discriminatory practices are capable of being well-disguised and it has been difficult to find a workable test to identify and expose them.

We recently won a case on appeal in the Sixth Circuit which will help establish ways to identify some of these subtle forms of discrimination. *Harper* v. *Hutton* concerned a black couple in Nashville, Tennessee, who had been refused rental of an apartment obstensibly because they were not credit worthy. We proved to the satisfaction of the appellate court that black applicants for apartments were subjected to standards and procedures far more exacting than those applied to white applicants. *Harper*

established that objective standards for determining credit worthiness must be universally applied. *Harper* will have a significant impact on all housing cases in the Sixth Circuit.

In view of the limited progress in getting housing cases certified as class actions, we continue to seek ways to bring actions that will affect large numbers of real estate firms. A noteworthy development has been the successful use of testing in racial steering cases in large areas, such as Delaware County in suburban Philadelphia, Milwaukee and New Haven. A legal test of the enforcement responsibility of country boards of realtors—an alternative to government inaction—is about to begin in *Coleman* v. *Carr Realty*, the Pennsylvania case. This is an action against five real estate firms (we settled with one firm earlier) and the County Board of Realtors. We seek compensatory and punitive damages and injunctive relief on behalf of all blacks who have sought homes in Delaware County. We are asking the court to certify the case as a class action and to order an affirmative sales policy to overcome the effects of past discrimination. The charges against the Board of Realtors which has more than 300 active and 500 associate members, allege improper policing and enforcement of fair housing laws, refusing to insure that its multiple listing service is used in a nondiscriminatory fashion and discouraging fair housing realtors from becoming members.

In the U.S. District Court for the Eastern District of Pennsylvania, which is hearing the case, we won an important procedural victory when the Judge refused to dismiss the Board of Realtors as defendants, which means we are going to trial against them. This is the first time that a Board of Realtors has gone to trial on charges that it insulated its member firms from discovery of violations of the federal fair housing law. If we win, widespread relief against every realtor in the country should be possible. In addition, if successful the case will provide a model for bringing area-wide rather than individual cases. Most important, it will cause real estate boards to be responsible for the practices and policies of member realtors under the supervision and monitoring of the courts.

Monsonis v. *Best Realty* is LDF's case against four major Brooklyn real estate firms that practice racial steering in the sale of housing. As reported last year, we have submitted a proposed settlement with the realtor and we are awaiting the final approval of the Court. The settlement enjoins further discrimination on the basis of race in the sale or rental of housing and requires the realtor to take affirmative steps toward implementing fair housing practices.

Two other housing-related initiatives are underway. One deals with federal relocation funds. The Uniform Relocation Assistance and Real Property Act requires that the sponsors of a federally financed project aid the tenants, owners and businesses displaced by the project in finding decent, safe and sanitary alternative locations that they can afford.

We are seeking to enforce these policies in *Bullard* v. *College of Charlestown Foundation*, a class action brought on behalf of all owners and tenants—primarily poor black persons and elderly white persons—who have been displaced by the expansion program of the College. By using the College Foundation to acquire the land from the occupants, the College avoided paying any relocation funds. It claims that the Foundation is a private institution and therefore exempt from complying with the federal law. We have completed pre-trial discovery and expect to go to trial.

LDF has filed a friend-of-the-court brief in *Conference of Federal Savings and Loan Association et al* v. *Alan Stein*, a case involving the application of California's anti-redlining statute to federal savings and loan institutions. The Federal Home Loan Bank Board is seeking a declaratory judgment that the federal banks are not subject to state regulations. The California statute established a comprehensive regulatory program governing all financial institutions which make, arrange and purchase loans on single to four-unit residential properties. It imposes more restrictions than the federal regulations on the lending institution's right to consider the location of property in granting or denying a loan application. In addition, California's Secretary for Fair Lending is given the authority to monitor the lending patterns and policies of all lending institutions in

the State and to take whatever steps are necessary to assure compliance with the Act.

Oral argument in the case was held in July 1979. LDF Director-Counsel Jack Greenberg argued that all civil rights statutes contemplate cooperation between the state and federal governments, and that California's statute is a model in this regard. We urged the District Court to deny relief to the Federal Bank Board because California's statute represents a positive, effective approach to combat redlining, and should be encouraged rather than frustrated.

EDUCATION

The *Adams* case, first filed by LDF in 1970, to compel HEW to enforce federal civil rights laws, regulations and guidelines in public education, continues to bring about integration in public education, particularly at the elementary and secondary level. Prior to *Adams*, LDF was required to bring scores of cases challenging segregation in public school systems. Today, much of the volume can be handled under *Adams*, giving LDF the opportunity to select principle-making, pace-setting cases in the school integration area.

It is ironic that on the final day of its 1978-79 term one of the cases decided by the Supreme Court turned on the issue of school desegregation. Twenty-five years after the High Court in *Brown* v. *Board of Education* and the companion school segregation cases called for an end to "separate but equal" public education facilities, it passed judgment on a plan to end present-day segregation in the Dayton and Columbus, Ohio public school districts. The Court upheld busing orders in both cities for the purpose of achieving integration. In these cases, *Columbus Board of Education* v. *Penick* and *Dayton Board of Education* v. *Brinkman*, the Legal Defense Fund jointly filed an *amicus* brief with the United Auto Workers.

Two other LDF cases concern the school boards in Austin and Dallas. In the Dallas case, which was first filed in 1970, the Supreme Court granted the school board and two white parents a petition for review. We have been associated with local lawyers who represent the plaintiffs and

were involved in writing the Supreme Court brief. The issues involve what kind of desegregation plan is permissible, how much busing should be allowed and how extensive it should be, and whether the school board is doing enough to effect desegregation throughout the system. Similar issues are at stake in the Austin case.

Legal Defense Fund attorneys have begun preparing motions in other pending cases that call for complete and immediate relief. In all, there are 30-40 active school cases on our docket. In addition, because many Legal Defense Fund cases concern the scope of remedy generally, the Court's ruling that school boards have an affirmative duty to desegregate will have a positive effect on those cases. It could result in a reassessment of other cases whether we believe relief has not been adequate; among those are one in Jacksonville, Florida where we seek further relief on the establishment of magnet schools, school construction plans and the general ineffectiveness of the present desegregation plan; and in Springfield, Illinois, where school closings and teacher dismissal are the issues.

In higher education we are dealing with issues in addition to affirmative action, including continuing dualism in many southern state-wide systems and the need to insure that the traditionally black colleges are not closed or downgraded in the effort to integrate state systems. One such case, *Geier* v. *Blanton*, concerns desegregation of the public higher education system in Tennessee. On October 1st, the Supreme Court declined to review the Sixth Circuit ruling in one aspect of *Geier*, ordering that the University of Tennessee at Nashville (UTN)—predominantly white—be merged into the pre-existing Tennessee State University (TSU)—historically black—in order to overcome the racially discriminatory public higher education system in Nashville. The merger, begun in July, will go ahead under the administrative control of the black school, as requested by the NAACP Legal Defense Fund which represents black students, potential students, faculty and staff in *Geier*. The Supreme Court's refusal to review the Sixth Circuit decision represents a major advance toward our twin goals of eliminating dualism in public higher education

in the South at the same time insuring that the traditionally black colleges are not closed or downgraded in an effort to integrate state systems. The Court's decision also reaffirms the obligation of statewide systems to convert to unitary systems. The merger is a comprehensive, innovative judicial remedy without substantial precedent in the elementary school context, specifically adapted to the needs of higher education in the Nashville area.

The second part of *Geier*—the one we have yet to fully litigate—concerns the system-wide desegregation of Tennessee higher education. Here, the District Court and the Court of Appeals declined to require, on the present record, accelerated statewide desegregation of students, faculty and administrative staff sought by LDF. Slow progress has been made toward that goal and the lower courts will now consider whether it has been fast and comprehensive enough. The courts have given us a further opportunity to show that lack of progress in desegregation would justify further relief.

Whatever remedies we develop will have significance for higher education generally. HEW's implementation of the higher education guidelines established under court order in *Adams* have referred to Geier (as decided in the lower courts) as a precedent. To the extent that *Geier* in its new aspect becomes a model, HEW is likely to emulate it. To too large an extent, HEW higher education requirements have had limited timetables, no enforcement requirements and inadequate provisions for funding. The law LDF makes in *Geier* will force HEW to adopt more effective guidelines, broadening the impact of *Geier* across all states with former dual systems of public higher education.

Apart from using litigation and the courts to formulate guidelines for dismantling dual systems, LDF is also seeking to evoke HEW's adjudicatory machinery in an administrative hearing in order to enforce existing guidelines. In a recent action growing out of *Adams*, a judge ruled that HEW can proceed with an administrative hearing against North Carolina for its failure to come up with an approved desegregation plan. LDF has been granted the right to intervene in the proceeding which is

expected to last throughout most of 1980 and will engage at least one staff attorney full-time while it is underway. Our major objectives are to require that North Carolina dismantle its dual system in accordance with present HEW guidelines, to defend the guidelines we consider appropriate, and propose new ones to replace those we consider inadequate or insufficient. The hearing is unprecedented in this context and could lead, eventually, to a cut-off of Federal funds to North Carolina's public higher education system, but, we hope, instead will lead to integration of higher education in that state.

DELIVERY OF HEALTH CARE SERVICES

Recently the United States District Court in Gary, Indiana gave permission for the parties to make public the terms of the settlement in the Legal Defense Fund's case, *Hatcher* v. *Methodist Hospital of Gary, Indiana*. This case, in which we represented Richard Hatcher, the mayor of Gary, Indiana, and the city's poor and minority residents, challenged the use of federal funds by Methodist Hospital to build a satellite unit in an all-white suburb of Gary which had siphoned doctors, nurses, other medical personnel, money and equipment from the inner-city hospital. The Legal Defense Fund had also named the U.S. Department of Health, Education and Welfare (HEW) as a defendant in the case, maintaining that HEW did not enforce civil rights laws governing federal funds for health care. The court-approved settlement delineates long-term plans to reverse discriminatory health-care policies in the Methodist Hospital System, including a commitment by the hospital to spend $20 million in the first phase of the negotiated settlement. The settlement calls also for intensified efforts to integrate the staff and patient census at both the city and suburban facilities. The Board of Directors of Methodist Hospital will be restructured to reflect the minority population in Gary.

Another major health care case is underway in San Antonio, Texas where we are challenging the actions of the County Health District which moved a downtown obstetrics facility 50 miles to a county health facility. We charge that

moving maternity services to the suburban facility discriminates against low-income inner city minority women of childbearing age in violation of Title VI of the Civil Rights Act of 1964 and various other civil rights authorities.

In New York, we are working with the New York Metropolitan Council of Branches of the NAACP to try to prevent the closing of municipal hospitals in New York City. LDF filed a class action lawsuit in federal court charging that the announced plan of Mayor Edward I. Koch and city health care officials to close four municipal hospitals in New York City violates federal due process and civil rights law, state and local health planning laws and various provisions of the State Constitution and City Charter. If successful, the suit would block City and State officials from approving or implementing any plans to reduce in-patient or out-patient services, to close hospitals or reduce services until all black and Hispanic residents have the same access to adequate health care as white residents. It would require that any illegal reduction be reinstated.

VOTING RIGHTS

Important issues concerning voting rights were put off for another year when the Supreme Court set for re-argument LDF's case in Alabama, *City of Mobile* v. *Bolden* and *Brown* v. *Moore*. *Bolden* involves the use of at-large elections to choose the City Commissioner, while *Brown* concerns the election of the School Board.

In Florida, three cases are pending in Pensacola, one against the City and two against the County to compel the use of single-member districts in voting for City officials and City and County Commissioners.

In the South, at-large elections discriminate against blacks by diluting, sometimes negating, their potential voting strength. For example, in a city council election held at-large—that is, city-wide—where ten positions are to be filled, typically no blacks will be elected even though blacks may be thirty percent of the electorate. If elections were held by district, blacks would be able to elect candidates from those districts where there were significant numbers of black voters concentrated. LDF has won a number of

suits barring at-large elections, with the result that there has been a substantial increase in the number of blacks elected in Southern municipalities.

DIVISION OF LEGAL INFORMATION AND COMMUNITY SERVICES

Throughout 1978 and 1979 the Division continued monitoring the efforts of the U.S. Department of Health, Education and Welfare (HEW) to comply with court orders in the longstanding omnibus *Adams* case filed by LDF in 1970 (and its companion *Brown* v. *Secretary of HEW*) which require HEW to perform its duty not to support segregation in public elementary, secondary and higher education. Beginning in 1977, as a result of court orders in *Adams*, HEW for the first time formulated and started implementing criteria for desegregation of state systems of public higher education in Arkansas, Florida, Georgia, North Carolina, Oklahoma and Virginia. During this time LDF staff worked closely with HEW in devising effective guidelines and monitored the Department's negotiations with the states over the specifics of desegregation plans.

The guidelines require that the states adopt specific commitments for recruitment, admission and retention of black students; eliminate duplication of programs in neighboring black and white institutions to promote desegregation; plans for staff and faculty integration; and plans to enhance the role of traditionally black colleges in an integrated society. With regard to this last guideline, LDF has worked vigorously to prevent downgrading or closing historically black colleges which have been consistently short-changed by the states in funding resources and programs.

At this juncture the issue involves HEW's requirement that the long-delayed desegregation of these six Southern states proceed. In all but North Carolina, five-year desegregation plans have been approved by HEW; Division staff will monitor closely their implementation. North Carolina officials have been particularly recalcitrant, challenging one of the most significant aspects of the guidelines by announcing that they would not close or transfer duplicate educational programs to promote integration in the system. In a recent action, a judge ruled that HEW can proceed

with administrative hearings against the state for failure to come up with an approved plan. This could lead, eventually, to a cut-off of federal funds. However, the judge would not allow HEW to defer new grants to the state. The hearing is expected to begin in January 1980. LDF has been granted the right to intervene and will be closely involved in every step in the enforcement proceeding.

The Division also has responsibility for monitoring the application of federal funds to state-supported vocational education systems. HEW's failure to withold federal funds from systems not complying with civil rights law has resulted in vocational schools which perpetuate patterns of sex and race discrimination. In an effort to eliminate these inequities, the Division began a program two years ago armed with provisions of the consent order in *Adams*. The program concentrates on the enforcement of civil rights laws by HEW's Office of Civil Rights (OCR) and on implementation of provisions of the Vocational Education Act of 1976 which provide that states give priority funding to economically depressed areas and require elimination of sex discrimination, sex bias and sex stereotyping in vocational education.

Recent efforts to effect change in vocational systems have been concentrated in a few states where we have extensive community contracts—Mississippi, Alabama, North Carolina and California. Projects are beginning in Pennsylvania, Louisiana and Delaware. In North Carolina where there is a regional Division staff person, we helped organize a citizens' committee and provided technical assistance to study the state's five-year plan. We documented patterns of race and sex segregation in programs and the general underrepresentation of minority teenagers in the system. We filed extensive comments with HEW outlining the failure of the state's plan to conform to federal standards, followed by a formal complaint. We are awaiting a response.

For the third consecutive year, the Division sponsored a Minority Women Lawyers Training and Technical Assistance Program which held its first law school-based seminar at Stanford Law School in California in July. The program

was attended by more than 100 black, Asian-American and chicana women lawyers from ten Western states. The seminar included an opening address by J. LeVonne Chambers, President of LDF, who gave an assessment of Supreme Court decisions under Chief Justice Warren Burger as they affect racial minorities and women. The theme of the program, "Minority Women Lawyers—Leaders in the Struggle for Justice", was addressed by Annie Gutierrez, an Attache with the Immigration and Naturalization Service at the U.S. Embassy in Mexico.

Panels and workshops during the three-day program examined topics relevant to the particular needs of the participants including the problems of minority women in nontraditional positions and the role minority women lawyers can play in fighting racism and sexism. The conferences included "nuts and bolts" discussion of litigation of employment discrimination (Title VII) cases, including how small firms can handle Title VII cases, procedures for representing federal employees and how to resolve competing interests of women, minorities and the handicapped in this area. Among those who participated in the Title VII panels were LaDoris Cordell, Assistant Dean, Stanford Law School; Morris Baller, Esquire, Mexican-American Legal Defense and Educational Fund; and Shirley Nakao, Attorney-at-Law, Disability Law Resource Center, Berkeley. Other Workshops dealt with recent developments in assuring women equal access to credit, addressed by Walter Gorman, Deputy Chief, General Litigation Section, Civil Rights Division, U.S. Department of Justice; challenging redlining and discrimination in housing and mortgages, moderated by Sandra Carter, U.S. Department of Housing and Urban Development, Los Angeles; and justice for minorities, women and children in institutions with Lynn Walker, Attorney-at-Law, who is chief of the Justice Department's section on prisons. Other topics discussed were how to represent minority businesses and institutions, legal approaches to special health problems of minorities, and representation of undocumented aliens. Participants in the these panels included Sam Norman, Esquire, Foundation for Assistance to Minority Enterprises,

Oakland; Sylvia Drew Ivie, Attorney-at-Law, Health Law Project, Los Angeles, and Annie Gutierrez.

EDUCATION AND LEADERSHIP DEVELOPMENT

The Earl Warren Legal Training Program continued its scholarship program. Since its inception, the program has provided scholarships for more than 1,100 black law students and has made a substantial contribution to increasing both the numbers and the skills of black lawyers. Eighty-nine Earl Warren Fellows also have benefited from the program since 1972. Scores are now district attorneys, mayors, state legislators and state and federal judges. Many more are in private practice, the corporate sector and in governmental service in high-level policy-making positions. Along with the Fellows, the more than 1,000 Earl Warren Scholars are working in communities throughout the country to provide much-needed legal services to black citizens. They are also active in the civic and political life of their chosen communities serving as advisors to numerous youth, religious and community organizations.

For the 1978-79 academic year, the Herbert Lehman Education Fund assisted 160 students—118 in formerly all-white colleges and universities in the South, and 42 in law schools in all parts of the country.

Initiated in memory of the late Senator Lehman in 1964—with the encouragement and support of the Lehman family—the Lehman Fund today depends upon contributions from the public for its scholarship funds. For the first time in its history, the Fund received contributions from just over five thousand men and women who gave a total of $262,188 in 1978.

Although the Lehman program is small, it has played an important role in establishing a flow of qualified black students to Southern institutions. It has helped hundreds of students prepare for a better life—not only for themselves but also for the communities to which they return after graduation.

BROWN v. *BOARD OF EDUCATION*—*25 YEARS LATER*

Hundreds of persons attended the Legal Defense Fund's four-day program in May 1979 to commemorate the 25th

Anniversary of the Supreme Court decision *Brown* v. *Board of Education*. Conferences were held in New York and Washington D.C. in conjunction with Columbia University's Center for the Study of Human Rights and the Howard University School of Law. Among the leading participants were Andrew Young, William T. Coleman, Jr., Vernon Jordan, Wiley A. Branton, members of the Black Congressional Caucus and scores of the nation's foremost attorneys, along with legal scholars, educators, foundation executives, journalists and civil rights leaders. Black and white delegates from South Africa and representatives from the Sudan, Ghana. India, the West Indies and the government of Great Britain participated. The program ran from May 14 through May 17.

White House Reception

A White House Reception for lawyers, plaintiffs and others connected with the *Brown* cases followed the program's closing session Thursday afternoon, May 17. Many of the Board and staff of the Legal Defense Fund were invited, along with several program participants. The President, Ambassador Andrew Young, HEW Secretary Joseph A. Califano and Dr. Mary Berry, Director of the U.S. Office of Education, addressed the 300 invitees.

25th Anniversary Dinner

The *Brown* 25th Anniversary commemoration ended with a dinner attended by 1,200 persons the night of May 17th in Washington D.C. Under the leadership of LDF, it was sponsored and attended by leaders of civil rights organizations, members of the Black Congressional Caucus, members of the United States Senate and House of Representatives, black elected officials, lawyers and plaintiffs from the *Brown* cases, and long-time friends and supporters of the Legal Defense Fund as well as all who participated in the four-day program. Andrew Young addressed the guests along with Paul C. Warnke, the U.S. arms treaty negotiator in 1977 and 1978 who was Chairman of the dinner. The keynote was given by Howard Law School Dean Wiley A. Branton. Others on the dinner program included William T. Coleman, Jr., Julius Chambers, Jack

Greenberg, D.C. Mayor Marion Barry and Ossie Davis who was Master of Ceremonies. The Reverend Joseph Lowery of the Southern Christian Leadership Conference delivered the Invocation.

> During the dinner a special message was read to the guests from Roy Wilkins who was not able to attend. It read, in part: "The brave plaintiffs of the NAACP branches in South Carolina, Virginia, Delaware and Kansas risked their lives and everything they owned to make America a better place to live. Thurgood Marshall, Robert I. Carter, Jack Greenberg and other lawyers of the NAACP Legal Defense and Education Fund championed their cause....if all of us continue to work together, closely and supportively, I am sure the day of complete freedom will be advanced greatly."

Pictured on the next two pages are participants in LDF's program commemorating the 25th Anniversary of *Brown* v. *Board of Education*. The program spanned four days beginning Monday, May 14, at Columbia University in New York with panels on the international implications of *Brown* followed by three days of conferences at Howard University School of Law in Washington, D.C. to discuss the educational and economic status of black Americans 25 years after *Brown* and the agenda for the 1980's. The program ended with a dinner sponsored by LDF attended by 1200 persons including civil rights leaders, lawyers, educators, appointed and elected officials and program participants.

Photo credits on page 23

PHOTOS

1. Dalcroze Midshows, South Africa
2. L to r., Constance Baker Motley, Clarice L. Black, Jr., Oliver Hill, Louis Redding
3. Andrew E. Bateman
4. Curtis Davis, Vilaj A. Bowens, Jack Greenberg
5. Bill Sorokjan, Judge
6. Vivian Scales (at Antioch) and plaintiffs from Bowens and companion cases
7. Joseph L. Rauh, Jr.
8. Bayard Rustin
9. Arthur Chaskalson, South Africa
10. L to r., Joseph L. Rauh, Jr., Louis H. Pollak, Alan Pifer, Vernon E. Jordan, Jr.
11. Jean E. Fairfax
12. Edgar Epps
13. L to r., Phyllis A. Wallace, John W. Powell, Jr., Percy J. Walcott
14. P. Telford Georges, West Indies

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15. L to r.,
William T. Coleman, Jr.,
Julius LeVonne Chambers,
Andrew Young, Ossie Davis
16. M. Carl Holman
17. Drew S. Days III
18. Samuel Ota Oyinkish, Jr.,
Ghana
19. Charles V. Hamilton
20. L to r.,
James M. Nabrit, Jr., Charles
T. Duncan, Charles L. Black
Jr., Charles S. Scott, J[illegible]
Scott
21. Dr. Alcinda Moyon, The
Sudan
22. Reception, 25th Anniversary
Dinner
23. J. Clay Smith, Jr.
24. L to r.,
Thompson Powers,
Judith Heimann,
E.W. Cleaves
25. Clifton Robinson, Great
Britain
26. Kenneth B. Clark
27. L to r.,
Anthony Lewis, Robert
Maynard
28. Gaines Ros Nichol

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40TH ANNIVERSARY CAMPAIGN 1978-1980

Goal: $18,500,000 Over Three Years to Secure Past Gains from Erosion and Add New Resources to Meet New Needs

To succeed, the campaign needs to sustain and increase giving among its traditional supporters—individuals (over 60,000), foundations, community organizations, Board members—and to find new support among those segments of the community which have not been substantial supporters in the past. In an effort to meet the budgetary goals by the end of the campaign, a major drive is underway in the corporate sector where a major part of the new funds is being sought. Efforts have begun also to increase contributions from the legal community through a special "Committee of the Bar", labor unions and other organizations and individuals not previously involved.

Corporations

John H. Filer, Chairman of Aetna Life & Casualty, who heads the national campaign and John J. Riccardo, former Chairman of the Board of the Chrysler Corporation and the campaign's national corporate chairman before his retirement, began organizing the country into eleven regional committees, each with a Chairman responsible for raising funds from prime companies in the regions.

By mid-1979 thirty-three national business leaders had joined John Filer and John Riccardo in the push to raise the $3,500,000 to come from the national corporate sector over a three-year period. Initial payments and pledges resulting from this special effort now total $1,405,500. The funds have come from the New York City, Chicago, Detroit, and the Akron/Cleveland regions. In Hartford/Northern Connecticut, Boston, Minneapolis, Philadelphia, Pittsburgh, Los Angeles, San Francisco, Houston, Dallas and major cities in the Southeast, planning is underway and efforts to recruit chairmen are moving ahead.

Legal Community, Labor Unions

We are developing major support nationally among lawyers. Robert Kutak of Kutak, Rock and Huie, Omaha, Nebraska has accepted chairmanship of a "Committee of the Bar" and is recruiting lawyers for regional committees

with a goal of $315,000 to be used primarily to finance LDF's lawyer training institutes.

We were privileged and honored to have had A. Philip Randolph chair our National Labor Committee. Since his death in May, Bayard Rustin, President of the A. Philip Randolph Institute and a member of LDF's Board, has been working with our staff and others to recruit a new labor chairman and committee.

Special Appeals, Out-of-Town Committees

Board members have responded enthusiastically to the 40th Anniversary Campaign with increased giving and three-year pledges of support. A program for special gifts and bequests has been developed in connection with the campaign and has resulted in positive responses and many new gifts.

The fundraising committees LDF has maintained for several years in Chicago, New England, Northern California, Philadelphia, Southern California, and Washington now function under the campaign structure. There has been an increase in giving from their constituencies since the campaign began. These committees have been particularly helpful in providing local support and coordination for the national corporate campaign.

CAMPAIGN INCOME (Pledges & payments, 1 January 1978 through September 1979) ..... $ 6,872,611
AMOUNT NEEDED TO REACH GOAL $11,627,339

Campaign Committee

National Campaign Committee
National Chairman
John H. Filer
Chairman
Aetna Life & Casualty

National Labor Committee
(in formation)

Co-Chairpersons
Special Gifts Committee
Mrs. Andrew Young
Orville H. Scheil

Chairman
Committee of the Bar
Robert Kutak

Regional Corporate Campaign Committees

Akron/Cleveland Region
Chairman
John H. Gerstenmaier
Vice Chairman
Goodyear Tire & Rubber Company

Chicago Region
Co-Chairman
James F. Beré
Chairman
Borg-Warner Corporation

A. Robert Abboud
Chairman
First Chicago Corporation

Robert E. Anderson
Chairman
Continental Illinois Corporation

Warren H. Bacon
Manager, Manpower Administration
Inland Steel Company

Ernest T. Collins
Saxury National Bank

Marshall Field
Chicago Sun-Times

Perry Fuller, Esq.
Partner
Hinshaw, Culbertson, Moelmann, Hoban & Fuller

Ben W. Heineman
President
Northwest Industries, Incorporated

John H. Johnson
President
Johnson Publishing Company

Philip M. Klutznick
Klutznick Investments

New York City Region

Chairman
Tom Killefer
Chairman
U.S. Trust Company of New York

Frank T. Cary
Chairman
International Business Machines

Howard I. Clark
Chairman, Executive Committee
American Express Company

Jack G. Clarke
Senior Vice President
Exxon Corporation

James W. Davant
Chairman
Paine Webber, Incorporated

Robert R. Douglass
Executive Vice President & General Counsel
Chase Manhattan Bank, N.A.

James L. Ferguson
Chairman
General Foods Corporation

Robert M. Fomon
Chairman
The E.F. Hutton Group, Incorporated

Amory Houghton, Jr.
Chairman
Corning Glass Works

Donald M. Kendall
Chairman
PepsiCo., Incorporated

John I. Loeb
Loeb Rhoades, Hornblower & Company

C. Peter McColough
Chairman
Xerox Corporation

Walter H. Page
Chairman
Morgan Guaranty Trust Company of New York

William R. Salomon
Limited Partner
Salomon Brothers

William E. Simon
Booz, Allen & Hamilton

San Francisco/Northern California Region

Chairman
Thomas E. Drohan
President
Foremost-McKesson, Incorporated

Anthony M. Frank
Chairman and President
United Financial Corp. of California

Gordon I. Hough
Chairman
Pacific Telephone & Telegraph Company

Charles A. Lynch
Chairman
Sage Corporation

Cornell C. Maier
Chairman
Kaiser Aluminum & Chemical Corporation

J. Gary Shansby
Chairman Shaklee Corporation

Robert B. Shetterly
President
Clorox Company

EDITOR'S NOTE

PAGES 204 thru 210 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

N.A.A.C.P. Legal Defense and Educational Fund, Inc.

Statement of Revenue and Expenses — General Fund

FOR THE YEAR ENDED DECEMBER 31, 1978

Recorded Revenue		
Contributions and fund raising for general purposes		$2,790,644.47
Bequests (1978 includes $50,000.00 for non-General Fund income)	$ 119,295.87	
Transfer bequests to General Fund unrestricted, (deduct) Note 1)	($ 50,000.00)	
Transfer bequest to Reserve for Contingency Fund, (deduct) (Note 1)	—	
Balance bequest recorded revenue for General Fund	(50,000.00)	69,295.87
Grants and contributions for Special Project Programs:		
Community services		108,850.00
Herbert Lehman education		262,187.80
Monitor performance of Federal agencies and administration programs designed to protect equal rights of minorities		125,000.00
Court award receipts, counsel fees and expenses		544,963.41
Interest and dividends		67,309.56
Total recorded revenue		3,968,140.91

Expenses			
Program services:			
Legal	$2,315,173.17		
Community services	286,089.53		
Herbert Lehman education	173,814.90		
Public information	70,850.82	$2,847,928.42	
Supporting services:			
Management and general	239,427.30		
Fund raising (includes for H.L. education, 1978-$187,731.44)	996,860.42	1,256,287.72	
Total expenses			4,104,216.14
Excess of (expenses over received revenue) to Statement 2			($ 116,075.23)

See notes to financial statements which are an integral part of these statements.

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N.A.A.C.P. Legal Defense and Educational Fund, Inc.

Details of Expenses — General Fund

FOR THE YEAR ENDED DECEMBER 31, 1978

	Program Services					Supporting Services		
	Legal	Community Services	H. L. Education	Public Information	Total Program Services	Management and General	Fund Raising	Total All Programs
Salaries	$1,096,695.37	$ 151,317.59	$ 30,938.94	$ 16,613.35	$1,295,536.85	$ 178,640.22	$ 61,444.61	$1,495,621.70
Payroll taxes and employee benefits	164,697.18	26,008.05	5,201.62	2,600.81	218,467.66	31,209.64	10,405.24	260,080.55
Total payroll costs	1,261,912.55	177,325.64	36,122.16	19,214.14	1,474,004.49	209,852.85	71,847.89	1,755,705.23
Direct expenses of litigation: Legal fees and expenses (supporting attorneys, court costs, expenses expert witnesses, consultants, travel staff attorneys, legal printing, law books and reference services (attorneys, conferences, etc.)	728,990.62				728,990.62			728,990.62
Community services regional offices expenses (rent, telephone and upkeep)		19,994.95			19,994.95			19,994.95
Herbert Lehman Education Scholarship grant awards (1978 includes $47,400 to L.W. for law scholarships) (Note 2)			119,490.00		119,490.00			119,490.00
Communication expenses, newsletter publication for public information, press releases, information clipping services, etc.				21,572.82	21,572.82			21,572.82

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	Program Services					Supporting Services		
	Legal	Community Services	R. I. Education	Public Information	Total Program Services	Management and General	Fund Raising	Total All Programs
Washington D.C. legislative office expenses (rent, telephone and upkeep)				11,123.98	11,123.98			11,123.98
Increase performance of Federal agencies and administrative programs (total Gross expenses only)				1,349.55	1,349.55			1,349.55
Fund raising (appeal letters, mailing, list rentals, build-up contributors files, national office fund raiser fees and expense reimbursements, fund raising affairs, etc.							541,625.18	541,625.18
Fund raising out of town office maintenance and upkeep, fund raising affairs and expenses							201,144.67	201,144.67
Fund raising expenses—R.I. Education (appeal letters, mailing, etc.)							187,731.48	187,731.48
Expenses in connection with bequest receipt							500.00	500.00
Rent and office maintenance—National Office	131,352.95	16,419.12	9,099.43	2,279.74	159,101.24	8,209.56	28,277.61	195,588.41
Telephone and communications (Note 1)	66,676.15	7,254.55	3,194.64	775.91	77,879.25	1,130.86	4,507.06	83,517.17
Postage and mailing	15,378.98	1,882.59	750.19	469.61	18,481.77	375.10	1,261.35	20,118.22
Stationery and office supplies	10,801.75	1,408.72	885.24	1,603.79	14,699.50	495.14	9,621.95	24,728.99
Copy machines and office press (rental, supplies and upkeep)	37,667.10	1,570.96	932.24	307.41	30,467.71	307.41	2,465.42	33,238.54
Furniture and equipment (rental maintenance, etc.)	14,507.79	2,117.44	787.72	248.48	17,661.45	341.36	3,703.61	21,706.40
Depreciation and amortization (furniture, equipment & leasehold) (Note 1)	10,464.74	984.95	492.45	123.11	12,065.25	246.22	—	12,311.45
Accounting, labor relations and other advisory services	26,568.80	3,221.10	1,228.44	352.11	31,370.45	996.33	664.22	33,211.00
Insurance (multi-peril, lawyers liability, fire, travel, etc.)	8,323.20	783.36	391.68	97.92	9,596.16	195.84	—	9,792.00
Conferences, workshops, meetings and travel	—	61,838.42		4,687.71	66,516.13	561.09	10,100.16	97,181.38
Pamphlets, brochures and other printed material	—	9,756.94		6,535.58	16,292.52		7,066.52	23,359.04
Employees interview, agency fees and moving expenses	11,775.17	1,353.34			13,128.51			13,128.51

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	Program Services					Supporting Services		
	Legal	Community Services	R. I. Education	Public Information	Total Program Services	Management and General	Fund Raising	Total All Programs
Employees overtime expense reimbursements (cabs, etc.)	5,693.15				5,693.15			5,693.15
Payroll and data processing services	3,995.25	499.16	99.83	49.92	4,642.16	149.75	199.66	4,991.57
Pension Trust expenses (Note 4)	11,654.97	1,454.37	290.88	145.44	13,525.66	727.18	290.87	14,543.71
Board directors and committees travel and meetings	—					6,464.26		6,464.26
Newspapers, books and publications	—	25.00			25.00	1,234.49	1,167.75	2,427.24
Other miscellaneous expenses (storage of records, safe-box, etc.)	—	116.56		5.60	122.16	8,225.86	4,687.02	13,035.04
Total expenses, to Statement 4	$2,315,173.17	$ 288,099.53	$ 173,814.90	$ 70,850.82	$2,847,938.42	$ 239,427.30	$ 996,360.42	$4,084,216.14

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See notes to financial statement which are an integral part of these statements.

The Earl Warren Legal Training Program, Inc.

Statement of Revenue and Expenses

FOR THE YEAR ENDED DECEMBER 31, 1978

Recorded Revenue			
Contributions and fund raising for general purposes		$141,150.00	
Contributions and grant for Lawyers Fellowship supervisor		10,000.00	
			$151,150.00
Grants and contributions restricted for Special Projects Programs:			
Law scholarship—Southern schools otherwise restricted and unrestricted (1978 includes $47,400 from LDF for E.W. law scholarships unrestricted) (Note 2)	235,449.22		
Lawyers Fellowships		46,000.00	
Lawyers Training Institute (None held 1978)		—	
			281,449.22
Interest and dividends			224.56
Total recorded revenue			432,823.78
Expenses			
Program services:			
Law scholarships—Southern schools, otherwise restricted and unrestricted	$283,893.36		
Lawyers Fellowships	107,954.89		
Lawyers Training Institute	—		
		391,848.25	
Support services:			
Management and general	19,519.51		
Fund raising	17,370.79		
		36,890.30	
Total expenses			428,738.55
Excess of recorded revenue over expenses, or (expenses over recorded revenue)			$ 4,085.23
Applicable to:			
Restricted Special Project Programs, (excess expenses), to Statement 2	($ 40,729.41)		
General Fund Unrestricted, excess recorded revenue, to Statement 2	44,814.64	$ 4,085.23	

See notes to financial statements which are an integral part of these statements.

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AUDITOR'S REPORT

June 28, 1979

N.A.A.C.P. Legal Defense and Educational Fund, Inc.
10 Columbus Circle (Suite 2050)
New York, New York 10019

Gentlemen:

I have examined the combined and individual Statement of Assets, Liabilities and Fund Balances of

N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
(AND AFFILIATED ORGANIZATION)

as of December 31, 1978 and 1977, and the related combined and individual Statement of Revenue and Expenses, and Statement of Changes in Fund Balances for the year ended December 31, 1978.

My examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as I considered necessary in the circumstances. The Earl

The Earl Warren Legal Training Program, Inc.

Details of Expenses

FOR THE YEAR ENDED DECEMBER 31, 1978

	Program Services				Supporting Services		
	Law Scholarships	Lawyers Fellowships	Lawyers Training Institute (None in 1978)	Total Program Services	Management and General	Fund Raising	Total All Programs
Salaries	$ 65,394.16	$ 11,500.00	$ —	$ 76,894.16	$ 16,600.00	$ —	$ 93,494.16
Payroll taxes and employee benefits	7,445.49	1,276.37	$ —	8,721.86	1,914.56	$ —	10,636.42
Total payroll costs	72,839.65	12,776.37	$ —	85,616.02	18,514.56	$ —	104,130.58
Law scholarship grant awards to various individual recipients (Southern schools, otherwise restricted and unrestricted)	194,953.00	—	—	194,953.00	—	—	194,953.00
Lawyers Fellowships direct expenses (retainer fees, law library, furniture, moving, travel, supervision, etc.)	—	89,344.16	—	89,344.16	—	—	89,344.16
Lawyers Training Institute (chief consultant fees, travel and accommodations at training institute, honorariums, etc.—none held in 1978)	—	—	—	—	—	—	—
Fund raising (salary and expense reimbursements to fund raiser)	—	—	—	—	—	16,847.99	16,847.99

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	Program Services				Supporting Services		
	Law Scholarships	Lawyers Fellowships	Lawyers Training Institute (None in 1978)	Total Program Services	Management and General	Fund Raising	Total All Programs
Rent and office maintenance—National Office	3,477.50	270.48	—	3,748.08	115.92	—	3,864.00
Telephone and communications	2,496.00	405.60	—	2,901.60	156.00	62.40	3,120.00
Postage and mailing	1,056.00	171.60	—	1,227.60	26.40	66.00	1,320.00
Stationery and office supplies	1,572.00	210.00	—	1,782.00	84.00	42.00	1,908.00
Copy machines and other press	864.00	360.00	—	1,224.00	72.00	144.00	1,440.00
Furniture and equipment	450.00	—	—	450.00	—	—	450.00
Accounting and advisory services	2,088.00	4,315.20	—	6,403.20	348.00	208.80	6,960.00
Conferences, workshops, meetings and travel	4,137.11	101.48	—	4,238.59	—	—	4,238.59
Interview expenses lawyers fellowship programs	—	—	—	—	—	—	—
Newspapers, books and publications	—	—	—	—	—	—	—
Other miscellaneous expenses	—	—	—	—	202.63	—	202.63
Total expenses, to Statement 6	$283,895.36	$107,954.89	—	$391,848.25	$ 19,519.51	$ 17,370.79	$428,738.55

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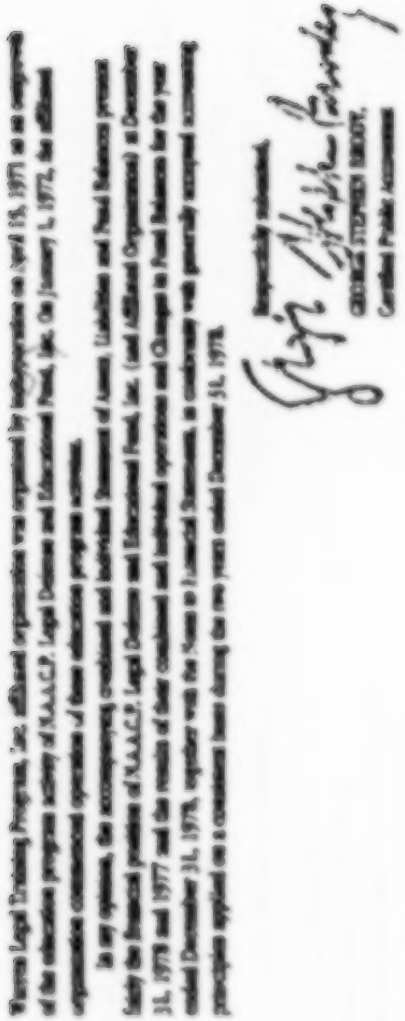
See notes to financial statements which are an integral part of these statements.



N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. (AND AFFILIATED ORGANIZATION) NOTES TO FINANCIAL STATEMENTS DECEMBER 31, 1978

1. ACCOUNTING POLICIES

The accompanying financial statements have been prepared in accordance with the Standards of Accounting for Voluntary Health and Welfare Organizations and the industry audit guides for Voluntary Health and Welfare Organizations of the American Institute of Certified Public Accountants. Expenditures for furniture and equipment, and leasehold improvements have been capitalized. Depreciation on furniture and equipment is provided on a straight-line basis over the estimated useful lives of the assets. Amortization on leasehold improvements is provided on a straight-line basis over the life of the lease. Depreciation of telephone installation is provided on a straight-line basis over the estimated useful life of the asset. The depreciation of the telephone installation (1978—$11,054; 1977—$11,054) is included in the telephone and communications expense category, this being the consistent policy of the organization. Marketable securities are valued at contribution date, or at acquisition date. All contributions are considered to be available for unrestricted use unless specially restricted by the donor. Bequest receipts are considered as General Fund Income except those bequests of $25,000 or more which are transferred directly to General Fund Unrestricted, which has been the consistent policy of the organization. In 1978 a bequest of $50,000 was received, this being transferred directly to General Fund Unrestricted. In 1975, pursuant to the Board of Directors Resolution, the bequest receipt of $691,015 from Estate of Margaret Abell (partial distribution) was not to be considered as part of General Fund Income, but instead to be transferred to a Reserve for Contingency Fund. In addition, any subsequent receipts representing partial and/or final distribution from the Estate is to be considered in the same manner. Further receipts of $233,465 were received

in 1976-77. Also, pursuant to Board of Directors Resolution, the gain or loss from sale of the marketable securities received in the bequest is to be considered as part of the Reserve for Contingency Fund, but the interest and dividends received is to be included as part of General Fund Income. Purchase of supplies are expensed as incurred and are immaterial in dollar amount.

2. INTER-ORGANIZATION AND INTRA-ORGANIZATION RECEIVABLE AND PAYABLE

LDF-EWLT inter-organization receivable and payable balances are eliminated for combined total purposes. Pursuant to the LDF Board of Directors Resolution dated January 9, 1979, the EWLT indebtedness due to LDF at December 31, 1978 in the amount of $293,484 was to be eliminated on total discharge of EWLT indebtedness due to LDF. LDF General Fund—LDF Restricted Contingency Fund intra-organization receivable and payable balances, at December 31, 1978 of $409,112 are eliminated for combined total purposes. Inter-organization receipt by EWLT Law Scholarships Unrestricted from LDF, and distribution payment by LDF Herbert Lehman education to EWLT Law Scholarship Unrestricted are each eliminated for combined total purposes.

3. PLEDGES RECEIVABLE AND DEFERRED REVENUE

This represents pledges from donors for grants and contributions to be received in various periods after December 31, 1978. In 1978 LDF received a contribution of $7,500 in advance for donor's 1979 commitment.

4. PENSION PLAN

LDF-EWLT has established a qualified employees noncontributory pension and retirement plan initially set-up in July 1964 covering all full time employees who were not over 60 years at original employment date. The organizations are current in the required annual pension contribution payments based on the annual actuarial valuation. Pension trust expenses of $14,543.71 for 1978, and $8,270.90 for 1977, are borne wholly by the employer.

5. LEASE COMMITMENT

Basic minimum annual rental commitments under the rental lease for its office at 10 Columbus Circle is approximately $130,650, exclusive of rent labor adjustment, electric, cleaning and office maintenance services. The lease expires September 30, 1983.

BOARD OF DIRECTORS

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**Members, Associate Executive Committee

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New York Office

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Deputy Directors
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Phyllis McClure—Washington, D.C.
Robert Valder—North Carolina

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Consultant
Dr. John W. Davis

Earl Warren Legal
Training Program, Inc.

Director
Buder T. Henderson

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Direct Mail
James R. Robinson

Foundations
Ann Dowling

Corporations
Malcolm W. Rucker

Regional Campaigns
John McDonagh

Library Services

Director
Donna S. Gloeckner

General Administration

Comptroller
Peter O. Judd

Personnel Manager
Ivalina Passé

*At October 1, 1979

A RESERVE AND BEQUEST PROGRAM

Bequests enable contributors to perpetuate their support for equal rights through the Legal Defense Fund. A simple form of bequest follows

Form of Bequest:

I give and bequeath _____ dollars to the *NAACP Legal Defense and Educational Fund, Inc.*, a charitable and educational corporation organized under the laws of the State of New York with headquarters located at 10 Columbus Circle, New York, New York 10019, to be used for such purposes as may be determined by the Board of Directors.

Bequests may be made contingent upon the death of another beneficiary, or they may be an amount remaining after other obligations are satisfied. Both outright bequests and trusts can be an important factor in reducing federal estate taxes.

You and your attorney may secure additional information by writing:

Jack Greenberg, Director-Counsel
NAACP Legal Defense Fund
10 Columbus Circle
New York, N.Y. 10019

The NAACP Legal Defense & Educational Fund is not part of the National Association for the Advancement of Colored People although it was founded by it and shares its commitment to equal rights. LDF has had for over 20 years a separate Board, program, staff, office and budget.

The Legal Defense Fund's annual report is on file with the New York State Dept. of State, 162 Washington Avenue, Albany, N.Y. 12231 or at our office.

The Legal Defense Fund is entirely supported by voluntary contributions. Gifts to LDF are tax deductible.

INFORMATION—NOT FOR PUBLICATION

LEGAL DEFENSE FUND
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
10 COLUMBUS CIRCLE, NEW YORK, N.Y. 10019
(212) 586-8397

LEGAL DEFENSE FUND VICTORIES WIN JOBS, HIGHER WAGES, BETTER WORKING CONDITIONS, HOUSING, AND OTHER BENEFITS FOR BLACK WORKERS AND THEIR FAMILIES

11-1-1979

I. Private And Public Employment

The following lists the amount of backpay awards won in a sample of employment discrimination cases brought on behalf of black workers by LDF. In virtually all of these cases back pay was not the primary focus of the litigation. Rather the aim of the cases was to open more and better paying jobs for black workers. This benefit has measurably enhanced the earnings of thousands of black workers represented in the cases listed below. The following are three illustrative cases.

1. The named plaintiff had for years been held in a laborer position. In 1966 when he filed a complaint alleging racial discrimination with EEOC he was earning $4,500.00. LDF subsequently sued on his behalf. The case was finally resolved in 1975. Today he is a journeyman mechanic, earning over $25,000.00.

2. At the time suit was brought, blacks represented less than 5% of all sworn personnel in the city's police and fire departments. After trial the court ordered a 1-for-1 hiring and promotion quota. By the end of 1978 blacks represented over 32% of all sworn personnel. Benefits of this nature are not reflected in the list that follows.

3. In this suit LDF sought to gain access for blacks to truck driving jobs that generally pay $22,000 but can range as high as $50,000. In early 1974 blacks held 70 or less than 2% of these jobs. By October 1974 LDF was successful in obtaining an order that contemplated 1-for-1 hiring until

blacks represent 25% of the workforce. The order also called for back pay of $100,000.00. As of May 1979 there were 497 blacks on the job or 16%.

1. *Andry* v. *Alabama Power* (Alabama) Cash benefits won: $33,750 back pay
2. *Armmer* v. *Memphis Water Gas and Light* (Tennessee) Cash benefits won: $850,000 back pay
3. *Boles* v. *Union Camp Corp.* (paper mill) (Georgia) Cash benefits won: $840,000 back pay (830 black employees)
4. *Boudreaux* v. *Baton Rouge* (Louisiana) Cash benefits won: $17,000 back pay
5. *Branch* v. *Reynolds Metals* (Virginia) Cash benefits won: $80,000 back pay
6. *Bumpers* v. *National Gypsum* (Alabama) Cash benefits won: $150,000 back pay
7. *Burks* v. *Babcock & Wilcox Co.* (Virginia) Cash benefits won: $120,000 back pay
8. *Burrell* v. *Kaiser Aluminum* (Louisiana) Cash benefits won: $255,000 back pay
9. *Cook* v. *Birmingham News* (Alabama) Cash benefits won: $3,064.75 back pay
10. *Cooper* v. *Philip Morris* (Kentucky) Cash benefits won: $140,000 back pay for approximately 90 employees.
11. *Cox* v. *Lenley* (Employment Security Div., Little Rock, Ark.) Cash benefits won: $42,500 back pay
12. *Dreher* v. *St. Joe Minerals Corp.* (Pennsylvania) Cash benefits won: $70,000 back pay (86 black workers)
13. *Duhon* v. *Goodyear Tire* (Texas) Cash benefits won: $122,783.50 back pay
14. *EEOC* v. *Container Corp.* (Florida) Cash benefits won: $240,000 back pay
15. *Ellis* v. *NARF* (Dept. of the Navy) (California) Cash benefits won: $500,000 back pay
16. *Ellison* v. *Rockhill Printing and Finishing Co.* (South Carolina) Cash benefits won: $314,000 back pay (312 black workers)

17. *English* v. *Seaboard Coastline R.R.* (Georgia) Cash benefits won: $289,000 back pay
18. *Fair* v. *Southern Electric Generating Co.* (Alabama) Cash benefits won: $115,000 back pay
19. *Faison* v. *ITT Rayonier* (Florida) Cash benefits won: $310,000 back pay
20. *Fisher* v. *Cities Service Oil Co.* (Louisiana) Cash benefits won: $1,750,000 back pay for approx. 300 black employees
21. *Gamble* v. *Southern Birmingham R.R. Co.* (sub. of U.S. Steel, Alabama) Cash benefits won: $120,000 to 43 black employees
22. *Green* v. *Warrior and Gulf* (Alabama) Cash benefits won: $60,000 back pay
23. *Jones* v. *Armstrong Cork Co.* (Georgia) Cash benefits won: $295,000 back pay
24. *Johnson* v. *City of Albany, Ga.* (Georgia) Cash benefits won: $515,000 to 200 black employees
25. *Johnson* v. *Goodyear Tire* (Texas) Cash benefits won: $200,000 back pay
26. *King* v. *Georgia Power* (Georgia) Cash benefits won: $250,000 back pay
27. *McHoney* v. *Colloway* (Dept. of the Army) (New York) Cash benefits won: $23,000 back pay
28. *Moody* v. *Albermarle Paper Co.* (North Carolina) Cash benefits won: $205,000 back pay for 140 black employees
29. *Mosley* v. *General Motors* (Missouri) Cash benefits won: $40,000 for 12 black employees
30. *Muldrow* v. *H.K. Porter* (Alabama) Cash benefits won: $200,000 back pay
31. *Munn* v. *Kimberly-Clark* (North Carolina) Cash benefits won: $750,000 for class of women and 60 blacks
32. *Myers* v. *Gilman Paper Co., St. Mary's, Ga.* (Georgia) Cash benefits won: $300,000 for 300 black employees
33. *Oglesby* v. *McLean Trucking* (South Carolina) Cash benefits won: $15,000 back pay

34. *Patterson* v. *Newspaper and Mail Deliverers' Union of New York and Vicinity* (New York) Cash benefits won: $100,000 to 19 black employees
35. *Pettway* v. *American Cast Iron Pipe and Foundry Co.* (Alabama) Cash benefits won: $1,000,000 to 833 black employees
36. *Powell* v. *Georgia Pacific* (Arkansas) Cash benefits won: $81.62 back pay per year of employment
37. *Reynolds* v. *Coomey* (U.S. Immigration Service) (Massachusetts) Cash benefits won: $5,000 back pay for black employee; plus promotion from GS-5 to GS-9
38. *Rock* v. *New York Telephone* (New York) Cash benefits won: $15,000 back pay 3 black employees
39. *Rock* v. *Norfolk & Western Ry. Co.* (Virginia) Cash benefits won: $1,100,000 back wages for 209 black workers plus $125/month guaranteed pay increment for approx. 69 black workers
40. *Rogers* v. *International Paper Co.* (Arkansas) Cash benefits won: $135,000
41. *Sharpe* v. *Ziegler* (Alabama) Cash benefits won: $3,000
42. *Stevenson* v. *International Paper Co.* (Alabama) Cash benefits won: $653,000 back pay (partial settlement)
43. *Suggs* v. *Container Corp.* (Alabama) Cash benefits won: $92,000 back pay
44. *Sullivan* v. *Winn-Dixie* (South Carolina) Cash benefits won: $132,500 back pay
45. *Terrell* v. *U.S. Pipe Co.* (Birmingham, Ala.) Cash benefits won: $500,000 back pay (partial settlement)
46. *Torrence* v. *First National Banks* (Arkansas) Cash benefits won: $233,000 back pay
47. *Walker* v. *Ralston Purina* (Georgia) Cash benefits won: $70,000 back pay
48. *Watkins* v. *Scott Paper Co.* (Alabama) Cash benefits won: $750,000 for a class of approx. 300
49. *Wolf* v. *Continental Teladyne* (Alabama) Cash benefits won: $20,000 back pay

50. *Younger* v. *Glamorgan, Lynchburg, Va. Foundry* (Virginia) Cash benefits won: $100,000 to 35 black employees

II. Teachers Discrimination Cases

51. *Hardy* v. *Porter* (Mississippi) Cash benefits won: $7,200 back pay
52. *Hunt* v. *Taggart* (Arkansas) Cash benefits won: $13,000 back pay
53. *Moore* v. *Tangipahoa Parish School Board* (Louisiana) Cash benefits won: $150,000 to 7 black teachers
54. *Singleton* v. *Vance County Bd. of Education* (North Carolina) Benefits won: Reinstatement; 2 years back pay under consideration
55. *Williams* v. *Anderson* (Arkansas) Cash benefits won: $100 back pay each for 4 black teachers

III. Housing Discrimination Cases

56. *Fox* v. *Wilkinson* (North Carolina) Benefits won: $1,000 damages for refusal to rent
57. *Frost* v. *New Star Homes and Rizzo* (New York) Benefits won: $520 damages for refusal to sell
58. *Gandy* v. *Pierson Suburban Realty of Wilmington* (North Carolina) Benefits won: $2,000 damages and consent decree
59. *Grier* v. *Hunter* (North Carolina) Benefits won: $700 damages
60. *Howard* v. *Watson* (Tennessee) Benefits won: Compensatory damages
61. *Kelly* v. *Leon Lepold* (Wisconsin) Benefits won: $5,000 damages
62. *Sanford* v. *Coleman Realty Co.* (North Carolina) Benefits won: $4,000 compensatory and punitive damages
63. *Sanford* v. *Corbin* (North Carolina) Benefits won: $6,000 punitive and compensatory damages
64. *Sanford* v. *Hoover* (North Carolina) Benefits won: $1,500 damages

IV. Affirmative Action

D.P.O.A. v. *Young* and *Baker* v. *City of Detroit* (Michigan)

In addition to cases in which LDF has forced employers to broaden the employment and job advancement opportunities of blacks, we are increasingly involved in cases where employers have voluntarily implemented affirmative action programs only to be sued by white workers seeking to turn back the clock. For example, in Detroit, at the urging of Mayor Coleman Young, the Police Department, in 1974, implemented an affirmative action program that called for 1-for-1 promotions at all levels. That program has thus far resulted in increases of black officers at the rank of sergeant from 48 (4%) to 145 (16%) and at the rank of lieutenant and above from 23 (7%) to 80 (28%). White officers brought two lawsuits. One resulted in a victory for the white officers. At that point the City called on LDF for help. LDF took over the appeal of the first case and also the trial of the second. On October 12, 1979 the appeals court nullified the victory of the white officers. Twelve days earlier the trial court in the second case accepted the City's justification for the program and noted its intention to dismiss the lawsuit of the white officers. Thus, unless the Supreme Court rules otherwise, Detroit's affirmative action plan will continue until the police department is reflective of the population it serves.

V. Health and Hospital

Hatcher v. *Methodist Hospital*

For example in the area of hospitals, when the only remaining major hospital in Gary, Indiana announced plans to move to the all-white suburbs, LDF, responding to the call of black Gary residents, brought suit. As a result the hospital was forced not only to keep the city hospital open, but to spend $18 million to upgrade it.

VI. Miscellaneous

65. *Jones* v. *Teddar* (South Carolina) Benefits won: Challenge to city council election system; 2 black councilmen elected.

66. *Coker* v. *Georgia* (Georgia) Benefits won: Death penalty for rape abolished 433 U.S. 584 (1977)
67. *James* v. *Stockham Valves & Fittings, Inc.* (Alabama) Benefits won: Class of 1500 Blacks. Preventing further discrimination in apprentice recruiting, hiring, employment testing and promotion practices, back pay and retroactive seniority to members of the class.

The above listed cases represent only a small fraction of the cases brought by LDF in recent years. This list is intended simply to illustrate some of the results of LDF's efforts.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS,

v.

HON. DONALD J. DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT

AFFIDAVIT OF EMANUEL OWENS

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

EMANUEL OWENS, being duly sworn, deposes and says:

1. I am presently employed by the NAACP Legal Defense and Educational Fund, Inc. as coordinator of its Combined Federal Campaign. I was hired into this position in the fall of 1981 and have held it continously since.

2. Of necessity I have kept track of all cash and pledge information received by LDF through the CFC. As of this date, LDF has received designated contributions, primarily from the 1981 CFC, from 131 of approximately 211 localities consisting of the following:

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
1981-1982 COMBINED FEDERAL CAMPAIGN
CASH RECEIPTS—MARCH 1983

ALABAMA		
Birmingham		$3,109.28
Montgomery		796.63
Tuscaloosa		246.97
Tuskegee		650.94
Selma		8.25
	TOTAL $	4,811.97

ALASKA		
Anchorage		1,960.69
	TOTAL $	1,960.69
ARIZONA		
Fort Huachuca		508.67
Tucson		600.60
	TOTAL $	1,109.27
ARKANSAS		
Blytheville		318.89
North Little Rock		500.00
	TOTAL $	818.89
CALIFORNIA		132.39
Barstow		
China Lake		2,311.29
Corona		66.81
Hanford		86.45
Los Angeles		8,471.28
Riverside		791.69
Sacramento		342.30
San Bernardino		795.42
San Diego		1,933.43
San Francisco		4,302.80
Santa Ana		1,272.00
Santa Maria		418.35
Santa Rosa		512.40
Twentynine Palms		693.90
Vallejo		1,318.17
Vandenberg AFB		110.70
Victorville		369.76
	TOTAL $	23,928.14
CONNECTICUT		
Bridgeport		15.02
	TOTAL $	15.02
DELAWARE		
Dover		824.47
	TOTAL $	824.47
FLORIDA		
Cocoa	$	780.20
Fort Myers		45.50
Jacksonville		1.82

FLORIDA (Continued		
Key West		291.97
Miami		1,457.37
Milton		75.52
Orlando		3,543.00
St. Petersburg		138.35
Tampa		569.13
	TOTAL $	6,902.86
GEORGIA		
Athens		27.10
Augusta		2,601.81
Columbus		854.79
Savannah		3,465.58
Valdosta		315.96
	TOTAL $	7,274.24
HAWAII		
Honolulu		3,331.12
	TOTAL $	3,331.12
ILLINOIS		
Chicago		8,274.56
Champaign		369.49
Waukegan		1,488.24
	TOTAL $	10,132.29
INDIANA		
Crane		83.69
Grissom AFB		282.00
	TOTAL $	365.69
IOWA		
Iowa City		11.64
	TOTAL $	11.64
KANSAS		
Pittsburg		.60
	TOTAL $	.60
KENTUCKY		
Fort Campbell	$	2,552.52
Fort Knox		1,612.39
Frankfort		94.73
	TOTAL $	4,820.41

LOUISIANA		
Alexandria		420.02
Baton Rouge		301.10
Bossier City		540.61
Fort Polk		294.89
Lafayette		152.75
Lake Charles		198.52
	TOTAL $	1,907.89
MARYLAND		
Bryans Road		226.14
Frederick		371.34
St. Mary's County		340.82
	TOTAL $	938.30
MICHIGAN		
Battlecreek		290.25
Detroit		7,944.14
Flint		15.70
Kalamazoo		160.08
Saginaw		35.89
Wurtsmith AFB		111.12
	TOTAL $	8,557.18
MISSISSIPPI		
Jackson		500.00
	TOTAL $	500.00
MISSOURI		
Columbia		137.64
Fort Leonard Wood		1,214.60
Jefferson City		270.09
St. Louis		2,335.40
	TOTAL $	3,957.73
MONTANA		
Missoula		16.46
	TOTAL $	16.46
NEVADA		
Las Vegas		1,165.85
	TOTAL $	1,165.85

NEW JERSEY		
Camden		77.11
Dover		46.11
Fort Monmouth		221.22
Trenton		104.52
	TOTAL $	448.96
NEW YORK		
Melville		641.95
New York City		2,983.61
Poughkeepsie		69.18
Rome		36.42
Syracuse		178.00
Waterloo		204.73
Watertown		41.60
West Point		449.96
	TOTAL $	4,605.45
NORTH CAROLINA		
Asheville		256.96
Camp LeJeune		2,580.96
Durham		223.08
Goldsboro		878.32
Raleigh		1,686.53
Winston		234.02
	TOTAL $	5,859.87
NORTH DAKOTA		
Grand Fork		432.22
	TOTAL $	432.22
OHIO		
Cincinnati		3,430.52
Mansfield		194.90
Newark		498.05
	TOTAL $	4,123.47
OKLAHOMA		
Lawton		1,974.31
McAlester		9.48
Oklahoma City		3,422.96
	TOTAL $	5,406.75

OREGON		
Eugene		135.14
	TOTAL $	135.14
PENNSYLVANIA		
New Castle		88.11
Pittsburgh		519.03
Tobyhanna		85.53
	TOTAL $	692.67
RHODE ISLAND		
Providence		413.98
	TOTAL $	413.98
SOUTH CAROLINA		
Columbia		167.81
Greenville		11.40
Sumter		3,460.43
	TOTAL $	3,639.07
SOUTH DAKOTA		
Rapid City		354.34
	TOTAL $	354.34
TENNESSEE		
Cumberland City		52.34
Gallatin		36.52
Knoxville		195.72
Memphis		1,162.81
	TOTAL $	1,447.39
TEXAS		
Corpus Christi		302.05
Dallas		1,316.05
El Paso		1,332.61
Fort Hood		4,972.09
Marlin		17.73
Texarkana		392.33
Wichita Falls		816.52
	TOTAL $	9,149.38

VIRGINIA		
King George		236.79
Petersburg		729.05
Richmond		3,511.48
Winchester		8.27
	TOTAL $	4,485.59
WASHINGTON		
Seattle		949.34
Bremerton		102.26
	TOTAL $	1,051.60
WEST VIRGINIA		
Beckley		6.56
Huntington		127.52
Martinsburg		71.98
	TOTAL $	206.06
WASHINGTON D.C.		
		45,569.06
	TOTAL $	45,569.06
TOTAL VERIFIED CASH RECEIPTS:	$	171,418.00
TOTAL UNVERIFIED CASH RECEIPTS:	$	55,228.51*
TOTAL CASH RECEIPTS:	$	226,597.00
TOTAL VERIFIED PLEDGE RECEIPTS:	$	225,500.00
TOTAL VERIFIED PLEDGE RECEIPTS OUTSTANDING:	$	54,082.00

* National Service Agency/Central Receipt Point reported substantial pledges to LDF for 1981-1982 CFC remain unverified, and should not be reflected in "Verified Cash Receipts" total until origin has been verified.

3. 1983 Combined Federal Campaign Income Projection for LDF

Based on analysis of amounts pledged to date in the 1982 CFC, NAACP/LDF can reasonably expect from $300,000 to $350,000 from the CFC in 1983:

a) The total amount pledged to LDF in eight local campaigns, reporting final totals pledged for 1982-1983, show a 20% increase over total pledges for 1981-1982 campaign.

b) LDF should receive from 0.5% to 1.5% of the total designated amount pledged to it in some 32 local campaigns as its share of that local campaign's undesignated fund pool.

c) Total national CFC receipts have increased 7% over total receipts pledged for 1981-1982 campaign year.

4. Therefore, from late 1981 through the end of 1983, the NAACP/LDF should have received between $525,000 and $575,000 from *designated* donations by federal employees and military personnel through the Combined Federal Campaign. Although it is difficult to obtain precise numbers of contributors they can be reasonably estimated to be 10,000-20,000 individual donors.

/s/ Emanuel Owens
EMANUEL OWENS

Sworn to and subscribed before
me this 23rd day of March, 1983.

/s/ Gloria A. Jones
Notary Public

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS,

v.

DONALD DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT.

AFFIDAVIT OF ROBERT L. BECKER

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT L. BECKER, being duly sworn, deposes and says:

1. I am an Associate Counsel employed by the Puerto Rican Legal Defense and Education Fund, Inc. ("PRLDEF"), one of the plaintiffs in this action, and submit this affidavit in support of plaintiffs' motion for summary judgment and a preliminary injunction.

2. As Associate Counsel I am fully familiar with the activities of PRLDEF generally. In addition, I am completely familiar with PRLDEF's activities vis-a-vis the Combined Federal Campaign ("CFC") since I have been responsible both for the litigation efforts, and the actual fund-raising efforts connected with the CFC.

3. Annexed hereto is an affidavit of M. D. Taracido, sworn to the 25th day of November, 1980, which was submitted in support of earlier litigation to gain acceptance into the CFC. It explains in detail how PRLDEF's litigation and non-litigation activities provide direct benefits and services of a health or welfare nature to identifiable individuals. I have knowledge, either personally or from having

reviewed records and files of PRLDEF, of all of the factual statements contained in that affidavit and, accordingly, incorporate it herein by reference.

4. The activities of PRLDEF's Education Division, as discussed in the Taracido affidavit, have remained essentially the same since that time although the number of people served has increased. PRLDEF's litigation activities have continued to emphasize the areas referred to in the Taracido affidavit and have also included litigation in the area of voting rights. Thus, through PRLDEF's efforts, large numbers of additional identifiable individuals have secured the opportunity to obtain or retain employment, have been afforded new and improved housing accommodations and have received increased access to improved bilingual education and increased access to government benefits. In each of these instances, specific and identifiable individuals have obtained specific and concrete benefits.

5. PRLDEF does not engage in any political activities. Its inclusion, therefore, in the CFC would not contravene Section 2(b)(1) of the Executive Order which requires avoiding the reality and appearance of using Federal resources to assist in fund-raising for political activities. The litigation that PRLDEF has been involved in over the last two years pursuant to the Voting Rights Act, 42 U.S.C. §1971 *et seq.*, has not had as its objective the "influenc[ing] [of] outcomes of elections" prohibited by Section 2(b)(3) of the Executive Order. The purpose of this litigation, which has been brought in New York, Pennsylvania, Connecticut and Illinois during the last two years, has been to prevent Hispanic voters from being discriminated against in the election process on the basis of their language or nation origin and also to insure that their vote is meaningful and effective. Moreover, this litigation, largely successful, has simply sought to enforce various rights Congress mandated in enacting the Voting Rights Act.

6. The foregoing discussion also serves as an example to demonstrate that PRLDEF does not seek to influence the determination of public policy matters through litigation which is also prohibited by Section 2(b)(3). Whether in the area of voting rights, employment or housing discrimina-

tion or access to government benefits or services, PRLDEF seeks to insure that the public policy of this country, as *already* expressed by Congress, is carried out and that the people on whose behalf these public policies have been enacted, receive the benefits that were intended.

7. PRLDEF does not maintain an office in Washington, D.C. and does not engage in lobbying to affect public policy, an activity also prohibited by Section 2(b)(3) of the Executive Order. In isolated instances during its 10 year history PRLDEF has been requested by Congressional committees, particularly in the area of education, to provide testimony on pending legisiation.

8. PRLDEF has not yet received any significant information concerning contributions from the just completed 1982-1983 CFC. For the 1981-1982 CFC, the first in which PRLDEF was permitted to participate, it only applied to a limited number of local campaigns because of a severe lack of time. Nevertheless, the record of contributions received shows that there were federal workers throughout the country who were interested and willing to contribute to PRLDEF's efforts. Even though the great majority of Puerto Ricans live in the Northeast and Midwest, PRLDEF was accepted into, and received contributions from, campaigns in the Southeast, Northwest and West, for example. Approximately 5% of the contributions to PRLDEF came from as far away as Honolulu, Hawaii. This demonstrates a genuine interest on the part of federal workers, when the opportunity is made available, to contribute to PRLDEF's efforts to eliminate discrimination against Hispanics.

9. As noted above, I have been PRLDEF's sole contact person for all CFC matters. During this time I have not received any complaints, either from federal workers or local federal coordinating groups, that PRLDEF's participation in the CFC has damaged or jeopardized the successful operation of the CFC. To the contrary, it is my understanding that there has been increased participation and contributions during the two campaigns in which PRLDEF and other similar charities have been admitted.

WHEREFORE, it is respectfully requested that plaintiffs' motion for summary judgment and a preliminary injunction be granted.

/s/ Robert L. Becker
ROBERT L. BECKER

Sworn to before me this
day of March, 1983.

LIZETTE A. CANTRES
Notary Public

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1888

NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC., PLAINTIFF,

v.

HON. ALAN CAMPBELL, DIRECTOR,
UNITED STATES OFFICE OF PERSONNEL MANAGEMENT,
DEFENDANT.

CIVIL ACTION NO. 80-2070

PUERTO RICAN LEGAL DEFENSE AND
EDUCATION FUND, INC., PLAINTIFF,

v.

HON. ALAN CAMPBELL, DIRECTOR,
UNITED STATES OFFICE OF PERSONNEL MANAGEMENT,
DEFENDANT.

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) S.S.·
COUNTY OF NEW YORK)

M. D. TARACIDO, being duly sworn, deposes and says:

1. I am the President and General Counsel of plaintiff Puerto Rican Legal Defense & Education Fund, Inc. ("PRLDEF") and submit this affidavit in support of plaintiffs' motion for summary judgment in the above captioned consolidated actions.

2. Defendant's rejection of PRLDEF's application to participate in the Combined Federal Campaign ("CFC") on the basis that it does not provide "direct services . . . in the field of health and welfare services" is not supported by the

documents and information submitted in connection with its application.

3. PRLDEF's litigation activities in the areas of employment, education, housing and access to government benefits and services provide direct benefits and services to identifiable individuals. To suggest, as defendant does, that because PRLDEF's litigation efforts also seek to eliminate pervasive discrimination, it does not provide direct services is simply incorrect. Similarly, the fact that much of PRLDEF's litigation is brought in the form of class action suits, does not detract from the direct nature of the benefits and services provided. Indeed, it has been the judgment of PRLDEF that, with only six full time staff attorneys, its efforts would serve and benefit a far greater number of people through the vehicle of class action litigation than by litigation solely on behalf of individuals. Moreover, it is undisputed that in its class action litigation, PRLDEF represents all members of the proposed or certified class. Some of the cases discussed in PRLDEF's application make it evident that numerous individual people directly benefit from these activities.

4. PRLDEF's early venture into the area of bilingual-bicultural education in *Aspira* v. *New York City Board of Education* resulted in providing and assuring an equal educational opportunity to over 100,000 Puerto Rican and other Hispanic children, as well as thousands of other non-English speaking children in the New York City School System. PRLDEF continues, to this day, to monitor the consent decree to insure that students presently entering the system are provided with an equal educational opportunity. In the area of housing, PRLDEF expects to go to trial in February, 1981, on behalf of plaintiffs contesting discriminatory practices in connection with the sale of almost 4,500 low income cooperative units. PRLDEF's recent victory in *The Guardians Association* v. *Civil Service Commission of the City of New York*, affirmed in substantial part by the Second Circuit, is presently resulting in the hiring as police officers of black and Hispanic persons who would not have otherwise been called for appointment. Finally, PRLDEF's continuing efforts in *Mendoza* v. *Blum*

have resulted in the hiring of 272 bilingual workers by the New York City Department of Social Services, thereby making the benefits and services of that agency accessible to thousands of non English-speaking persons heretofore prevented from receiving such benefits and services.

5. Direct services are also provided by PRLDEF to numerous individuals through non litigation activities, most notably the activities of the Education Division. Defendant's repeated reference, in this regard, to a one sentence statement in PRLDEF's 1979 Annual Report that "litigation continues to be of primary importance to the overall mission of the Fund" overlooks all of the additional activities in which direct services are provided.

6. The work of PRLDEF's Education Division is structured around three different areas. Its pre-admissions program concentrates on encouraging and assisting young men and women in gaining admission to law school. Its activities include sponsoring an LSAT prep course several times a year, organizing writing workshops and providing advice and counseling. It is estimated that these activities are provided to almost 300 prospective law school applicants each year. Evidence of its effectiveness is demonstrated by the fact that law school enrollment for Puerto Ricans has increased from about 90, prior to PRLDEF's creation, to over 450 at the present time.

7. The second area of involvement by the Education Division is its post admissions program. Three specific activities are included within this area. PRLDEF operates an internship program for ten weeks each summer during which three law students work full time with staff attorneys to gain exposure to the practice of law generally and to civil rights law in particular. These students are paid a weekly salary and the Fund spends over $6,000 per year in operating this program to encourage law students to pursue a career in civil rights litigation. PRLDEF also awards scholarships each year to assist minority students in pursuing their legal careers. Generally there are 15 scholarship recipients annually who receive a total of approximately $12,000. Finally, the Education Division is in the process of establishing a network of law students to provide peer

counseling and substantive law counseling for students enrolled in law school. When fully operational, it is estimated that this program will assist about 150 students annually, throughout the northeast.

8. The third area of involvement by the Education Division is in professional development and training. These activities include a Visiting Attorney Fellowship program in which three recent law school graduates are selected each year to work at PRLDEF to gain experience in the practice of civil rights litigation, with the ultimate objective of increasing the number of Hispanic attorneys practicing law in the area of civil rights. Through the payment of salaries and other related expenses, PRLDEF now spends over $60,000 a year on this program. The professional development and training program also includes the provision of stipends to five law school graduates each year totaling approximately $3,000 to meet living expenses for a two month period while they study for the Bar Exam. Lastly, the Education Division is now in the process of developing seminars in civil rights law for practicing attorneys so that a network of cooperating attorneys can be created to provide additional legal assistance to persons who have suffered discrimination, particularly in the areas of employment and housing. It is anticipated that some 200 lawyers will participate in this seminar series.

9. PRLDEF is in the process of publishing its first of a series of quarterly newsletters which will be distributed nationally to Puerto Rican and other civil rights lawyers and non lawyers active in the civil rights field. The purpose of the newsletter is two-fold. First, to provide others working in the civil rights field with substantive information to assist them in their work. Second, to appraise others of PRLDEF's activities as a way of generating additional opportunities for PRLDEF to make its services available.

10. PRLDEF has, almost since its inception, also been engaged in an extensive referral and information program. Calls are continuously received both from individuals seeking advice and information regarding their legal rights and from attorneys throughout the country seeking assistance in areas of expertise possessed by Fund attorneys.

The assistance provided through this activity ranges from simple referrals to the preparation of legal memos.

11. During the past year PRLDEF has also embarked on an effort to handle, through litigation, a limited number of individual complaints of discrimination. This change in emphasis recognizes that individual actions not only benefit the particular individual involved, but may also provide a vehicle for affecting and benefiting larger number of persons as is the case with class action litigation. The decision to accept individual cases was also motivated by a desire to enhance the experience of the participants in the Visiting Attorney Fellowship program.

12. The foregoing amply demonstrates that almost all of the activities of the Puerto Rican Legal Defense and Education Fund, Inc. are designed to and do provide direct benefits or services to individuals.

WHEREFORE, it is respectfully requested that plaintiffs' motion for summary judgment be granted.

/s/ M. D. Taracido
M.D. TARACIDO

Sworn to before me this
25th day of November, 1980.

/s/ Robert L. Becker
Notary Public

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action NO. 83-

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS,

v.

HON. DONALD J. DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT

AFFIDAVIT OF VALERIE V. AMBLER

STATE OF NEW YORK)
SS.:
COUNTY OF NEW YORK)

VALERIE V. AMBLER, being duly sworn, deposes and says:

1. I am presently a member of the Board of Directors of the Federally Employed Women Legal Education Fund, Inc. I am an attorney in private practice and have been involved in litigation in the District of Columbia involving Title VII cases on behalf of federal employees.

2. From 1976 to 1981 I served as the first president of the Federally Employed Women Legal Education Fund, Inc. FEWLEF was set up as a charitable tax-exempt organization for the specific purpose of assisting federal employees to seek vindication of their rights under the civil rights statutes, particularly with regard to claims of employment discrimination and to perform educational services for federal employees related to employment discrimination. FEWLEF was approved by the Internal Revenue Service as a tax-exempt organization eligible for charitable donations under the Internal Revenue Code.

3. The work of FEWLEF is carried out largely through support or involvement in litigation brought under the Civil Rights Act of 1964, as amended, the Civil Service Reform Act of 1978, and/or the Equal Pay Act. Thus, FEWLEF is

engaged in activities designed to carry out and implement the public policy of the United States as established by acts of Congress. We do very little legislative work, and any that we do is in full conformity with the limitations of the Internal Revenue Code and IRS regulations.

4. As a new organization FEWLEF experienced difficulties in raising funds. Much of the efforts of the Board of Directors, which was composed of volunteers who were both federal employees and persons privately employed, were directed towards developing sources of income and laying plans for establishing a full program. Relatively small amounts of funds were raised in the first few years of FEWLEF's existence.

5. In 1981, following the order of this Court *NAACP Legal Defense and Educational Fund, Inc.* v. *Campbell*, 504 F. Supp. 1365 (D.D.C. 1981), FEWLEF applied for admission to the Combined Federal Campaign. The organization was admitted for both the fiscal year 1981 and 1982 campaigns.

6. To my knowledge FEWLEF is the only organization in the Combined Federal Campaign whose purposes are specifically and exclusively related to enforcement of the rights of federal employees. We received in contributions from the 1981 campaign more than $30,000 from federal employees in a number of localities. This amount was significantly greater than any amounts we have been able to raise before, since we were now able to directly appeal to our natural constituency. As a result of the funds received from the Combined Federal Campaign, FEWLEF has been able to hire staff and begin to develop a full program of legal and educational activities which will increase our ability to respond to the needs of federal employees who are suffering discrimination in employment.

7. If we are excluded from the Combined Federal Campaign it will be extremely difficult for us to raise comparable amounts of money. A much greater proportion of the funds we raise and the efforts of the organization will have to go to fund raising activities, with the result that a smaller proportion of the organization's resources will be able to be used for its program. The net result will be that

federal employees will receive fewer services from FEWLEF than if we were permitted to continue our participation in the Combined Federal Campaign.

/s/ Valerie V. Ambler
VALERIE V. AMBLER

Sworn to and subscribed before
me this 23rd day of March, 1983.

/s/ Gloria A. Jones
Notary Public

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS

v.

DONALD DEVINE, DIRECTOR UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT

AFFIDAVIT OF ROBERT T. COULTER

DISTRICT OF COLUMBIA

SS.:

CITY OF WASHINGTON

ROBERT T. COULTER, being first duly sworn, deposes and says:

1. I am the Executive Director of the Indian Law Resource Center. I serve as the principal executive officer, as a member of the Board of Directors, and as the lead attorney for the Center. As such I have detailed knowledge of the Center's purposes, programs, and operations.

2. The Indian Law Resource Center is a not-for-profit corporation under the laws of the District of Columbia. The Center is a charitable and educational organization under Section 501(c)(3) of the Internal Revenue Code as determined by the Internal Revenue Service.

3. The purpose of the Center is to defend the human, civil, and other legal rights of Indian peoples, particularly those in financial need, by providing legal advice and assistance. The Center carries on programs of education and research for the purpose of combatting prejudice and discrimination against Indian peoples. The Center carries on and sponsors research and study in the fields of law and history relating to Indians and carries on public educational activities in these fields.

4. The Center's work particularly concerns the rights of Indian peoples, especially Indian tribes and governments,

as established or guaranteed by treaties, by the United States Constitution and other federal statutes and law. In all cases the Center represents Indian groups or individuals who could not afford to pay attorneys in private practice.

5. Litigation is a relatively small part of our work, accounting for less than 25% of our budget. Most of the litigation the Center handles is for the purpose of defending or protecting Indian land rights. These cases typically are massive in nature, lasting many years, and the Center's clients are usually one of many parties in each case.

6. The Center carries on much work in the nature of non-judicial dispute resolution. We most often assist clients in achieving out-of-court settlements of their cases and disputes.

7. The Center also writes and distributes articles for publication dealing with topics of Indian rights and the law affecting Indian peoples. These articles are for general public and professional legal education.

8. The Indian Law Resource Center is not a political action or advocacy organization within the meaning of the Internal Revenue Code or otherwise. The Center virtually never conducts any lobbying activity as such, and all activity relating to legislation is in full conformity with the Internal Revenue Code and the regulations of the Internal Revenue Service. From time to time the Center is requested to provide information to various committees of Congress relating to bills affecting Indian rights.

9. The Center conducts no activity whatsoever relating to elections.

10. The end result of our work is to provide concrete benefits to Indian communities and individuals-benefits such as health care and needed economic resources such as land or increased control of Indian resources. Yet our work seeks to benefit the public more broadly through helping to preserve Indian cultures, communities, religions, and other elements of Indian heritage, and through increased public understanding about Indian history and Indian rights.

11. The Center is supported entirely by grants and contributions from foundations, churches, and individuals. The

Center neither solicits nor accepts any government grants or contracts.

12. The Center received known pledges of more than $40,000 in the 1981 Campaign, although we were able to apply to participate in only about half of the local campaigns. Thus, Combined Federal Campaign contributions make up about between 10% and 14% of our annual budget of about $270,000.

/s/ Robert T. Coulter
ROBERT T. COULTER

Sworn to and subscribed before
me this 29th Day of March, 1983.

/s/ [Illegible]
Notary Public

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS,

v.

HON. DONALD J. DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT.

AFFIDAVIT OF WILLIAM L. ROBINSON

IN THE
SS.:
DISTRICT OF COLUMBIA

WILLIAM L. ROBINSON, being duly sworn according to law, deposes and says:

1. I am an attorney admitted to the bar of the District of Columbia, the State of Ohio, and admitted to practice before the Supreme Court of the United States, most of the United States Courts of Appeals, and various federal district courts.

2. Since October, 1979 I have served as Director of the Lawyers' Committee for Civil Rights Under Law. In this capacity I am the chief operating officer of the organization, responsible for the day-to-day administration of its program and the work of its staff, and reporting to its Board of Directors. I am also responsible for overall planning and execution of fund-raising activities for the Lawyers' Committee.

3. The Lawyers' Committee for Civil Rights Under Law is a national organization originally founded in 1963 at the request of the President of the United States. The Committee seeks to mobilize the *pro bono*, voluntary services of the private bar in the United States to assist victims of invidious discrimination on the basis of race, ethnic origin or

sex to obtain redress. The staff of the Lawyers' Committee has directly represented such individuals in litigation and the Committee also has undertaken a variety of educational and other activities to provide assistance to minority, impoverished and disadvantaged persons throughout the United States. The Committee is a non-profit charitable corporation incorporated in the District of Columbia which is exempt from federal income taxation pursuant to 26 U.S.C. §501(c)(3) and contributions to which are deductible from individuals' taxable incomes pursuant to 26 U.S.C. § 170(c).

4. In 1968 the Lawyers' Committee began an "Urban Areas Project" designed to replicate its activities on the local level in a dozen cities across the country. This effort resulted ultimately in the establishment of a number of local committees, all but one of which have been separately incorporated, have obtained separate tax-exempt status pursuant to 26 U.S.C. § 501(c)(3), and are financially independent of the (national) Lawyers' Committee. The single exception, the Washington, D.C. Lawyers' Committee for Civil Rights Under Law, works in the D.C. metropolitan area but is part of the national Lawyers' Committee for accounting and tax exemption purposes. The Washington Committee has its own Board of Directors and staff Director, and conducts its own earmarked fund-raising, but works closely with the national Committee and its Board of Directors.

5. The Lawyers' Committee for Civil Rights Under Law maintains its national office in Washington, D.C. and since 1965 has operated an office in Jackson, Mississippi. The Jackson office legal staff has over the years provided legal assistance to thousands of black citizens in that state who suffered injury caused by racial discrimination.

6. The principal work of the Lawyers' Committee is the legal representation of individuals and classes of individuals in lawsuits challenging discrimination in a wide variety of substantive areas, including equalization of municipal services, voting, employment, housing, educational opportunities, judicial proceedings, and the distribution of benefits. Nearly without exception, the Lawyers' Committee repre-

sents only individuals who are financially or otherwise unable to secure counsel to press their claims. The activities of the Committee have resulted in very substantial, measurable, tangible benefits to individuals and communities. A few examples are:

—The Lawyers' Committee litigated—and won—a dozen cases challenging inequalities in the provision of standard municipal services and facilities (such as water, sewers, drainage, street and sidewalk paving, fire protection, and recreational facilities) to predominantly minority neighborhoods in Mississipi, Michigan and Florida. As a result of court orders or consent decrees in those cases, literally millions of dollars have been expended to improve the quality of life and eliminate substandard conditions which minority citizens were forced to endure.

—The Committee's fair employment litigation has resulted in the recovery of large amounts of back pay by individuals to compensate them for the unlawful discrimination which they suffered. A class of 300 women employees of the Bindery Division, Government Printing Office, will receive back pay estimated to total $12 million in *Thompson* v. *Sawyer*. A settlement of *Scott* v. *International Paper Company* provides $412,000 in back pay to a class of 208 present and former black employees of the firm's paper mill in Natchez, Mississipi. Stewardesses forced to take early maternity leaves benefited from a $1.2 million back pay fund in *MacLennan* v. *American Airlines*. These are but a few examples. Scores of individuals have also obtained employment, reinstatement or promotion in employment discrimination suits handled by the Lawyers' Committee.

—Since 1975 the Lawyers' Committee has operated a Federal Education Project which has worked closely with parent and local community groups throughout the country to assist them in making the federally funded school programs in their local districts more effective. The Project has conducted training workshops for thousands of parents in locations across the nation; it publishes a monthly Newsletter available without charge to parents which has a current circulation in ex-

cess of 8,000. Through the Washington, D.C. Committee, legal counsel is provided directly to parent councils at twelve individual District of Columbia public schools in the Anacostia area; this assistance has enabled the parents' organizations to secure improvements in such areas as school security, instructional supplies, etc.

—The Committee has been involved in major litigation affecting education, from school finance reform cases in 28 states which seek to guarantee an equal educational opportunity to children residing in low-property-wealth school districts, to school desegregation cases in Montgomery County and Prince George's County, Maryland, to litigation which ended discriminatory pupil testing, grouping and promotion practices in rural Greensville County, Virginia.

—The Committee has also been heavily involved in voting rights litigation to ensure that black and other minority citizens may register to vote, cast ballots, and have their votes counted without discrimination. Particularly in Mississippi, the Committee has long toiled in the courts to obtain fair apportionment plans which do not dilute the voting strength of the State's black citizens.

7. As the preceding description, albeit incomplete, demonstrates, the work of the Lawyers' Committee provides services and benefits directly to the clients whom we represent in litigation. Although our activities focus on the elimination of invidious discrimination because of race, national origin, or sex, we represent real parties who have real legal claims in our litigation, and we do not bring abstract or hypothetical cases to advance any theory or policy. Our voting rights cases do not seek to vindicate any partisan political cause but rather to enforce statutory and constitutional rights regardless of partisan political affiliation.

8. The Lawyers' Committee for Civil Rights Under Law is not a political action or advocacy organization within the meaning of the Internal Revenue Code. The Committee engages in a minimal amount of legislative activity as explicitly authorized by the Internal Revenue Code and the Tax Reform Act of 1976; that activity is concerned solely and

entirely with statutes or proposed statutes that affect the remedies available to the classes of individuals whom we represent in lawsuits, *i.e.*, the disadvantaged and those suffering from discrimination based on race, national origin or sex.

9. The Lawyers' Committee was first admitted to the Combined Federal Campaign in 1982 as a National Service Agency and applied to participate in some 70 local campaigns around the country. (The number of applications submitted to local CFCs was limited because the Lawyers' Committee had a period of only two weeks within which to submit such requests for participation.) We have not yet been informed whether or not the Committee was admitted to all of these campaigns and to date we have received very little information concerning funds raised for the Committee in the 1982 CFC. However, initial reports from the Combined Federal Campaign for the National Capital Area indicate that the Lawyers' Committee was designated to receive nearly $20,000 in contributions in that local campaign alone. Although that sum, considered alone, does not constitute a substantial proportion of the Committee's annual operating budget (which approximates $2 million), it is highly significant because unlike most foundation support received by the Lawyers' Committee, CFC contributions are unrestricted funds which may be applied to meet needs as they arise for the clients of the Committee.

/s/ William L. Robinson
WILLIAM L. ROBINSON

Sworn to and subscribed:
before me this 29th day
of March, 1983.

/s/ Valerie Prather
VALERIE PRATHER
Notary Public
My Commission expires on: March 31, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action NO. 83-

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFF,

v.

HON. DONAL DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT.

AFFIDAVIT OF EARL M. BLAUNER

I, Earl M. Blauner, being first duly sworn, state as follows:

1. I reside at 1177 Green Street, San Francisco, California, 94109.

2. I am an attorney and work for Sierra Club Legal Defense Fund, Inc. (SCLDF), 2044 Fillmore Street, San Francisco, California, 94115. My responsibilities include management of Sierra Club Legal Defense Fund's participation in the Combined Federal Campaign, and I am personally familiar with the details of that participation.

3. Sierra Club Legal Defense Fund is a nonprofit corporation dedicated to the use of existing legal remedies to protect the natural and human environment of the United States. It provides legal and information and referral services to individuals and organizations throughout the nation.

4. Sierra Club Legal Defense Fund's application for participation as a National Service Agency in the 1982/83 Combined Federal Campaign was approved by the United States Office of Personnel Management (OPM) on July 23, 1982. SCLDF subsequently applied to approximately 560 local campaigns throughout the country and was accepted in at least 256 of them, either immediately upon application or after appeal to OPM. 200 of the local campaigns have not notified SCLDF of their eligibility decision. Based on preliminary returns from some of the nonreporting local campaigns, it appears that at least the majority of them did

find SCLDF eligible to participate. The number of local campaigns SCLDF participated in, therefore, is substantially larger than 256 and may be as high as 360.

5. Preliminary returns from local campaigns show that substantial numbers of Federal employees throughout the country are supporting SCLDF with contributions through the Combined Federal Campaign.

6. With partial reports of pledges available from only 25 of the more than 256 local campaigns SCLDF is participating in pledges of $113,222.00 to SCLDF have been reported.

7. A partial list of pledges reported is as follows:

Washington, D.C.	$52,761
San Francisco, California	13,626
San Diego, California	11,058
Honolulu, Hawaii	7,152
Chicago, Illinois	7,117
Los Angeles, California	5,810
Denver, Colorado	4,853
Dayton, Ohio	1,988
New York, New York	1,862
Bakersfield, California	672
Austin, Texas	596
Cincinnati, Ohio	549
Newark, New Jersey	516
El Paso, Texas	382
Key West, Florida	380
Colorado Springs, Colorado	155
Frederick, Maryland	134
Minneapolis-St. Paul, Min.	130

8. Totals less than $100 were pledged by Federal employees in Winchester and Quantico, Virginia, Pensacola, Florida, Tacoma and Walla Walla, Washington, Crane, Indiana, Champaign, Illinois, and Batavia, New York.

9. It is my estimate, based on these preliminary returns, that Sierra Club Legal Defense Fund should receive contributions from the 1982/83 Combined Federal Campaign of at least $140,000 and that the sum may reach $230,000 or more.

10. $140,000 to $230,000 represents from seven percent to twelve percent of SCLDF's current annual budget. This money will enable SCLDF to provide additional legal services to its clients to assist them in their efforts regarding air and water quality, toxic chemicals, public lands preservation, wildlife and other environmental concerns.

11. Over the last ten years, on behalf and at the request of its clients, the Sierra Club Legal Defense Fund has brought numerous actions to enforce laws that protect the public health and welfare by regulating air pollution, water pollution and toxic wastes. SCLDF has been involved for over a decade in establishing and enforcing laws relating to prevention of significant deterioration of air quality. In the past several years, SCLDF attorneys initiated court actions regarding the setting of ozone standards and new source performance standards for coal-burning power plants. Staff are presently involved in a legal challenge relating to the regulation of tall stacks used by the utility industry and others as a means of avoiding pollution control of harmful sulfur dioxide emissions. The elimination of toxic chemicals from water supplies has been the goal in legal actions in Massachusetts, Pennsylvania, and Alabama, and indiscriminate use of herbicides and other toxic chemicals has been opposed in the states of Arkansas, California, and South Dakota, among others. The results of these and other SCLDF actions have a direct effect on the health of SCLDF's individual clients, the members of its organizational clients, and the public at large.

Dated: March 29, 1983

/s/ Earl M. Blauner
EARL M. BLAUNER

State of California
County of San Francisco

On March 29, 1983, before me, the undersigned, a Notary Public, in and for said State, personally appeared Earl M. Blauner, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

/s/ Diana C. Laczkowski
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.,
PLAINTIFF,

v.

HON. DONALD J. DEVINE, DIRECTOR UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT DEFENDANT.

AFFIDAVIT OF JONATHAN LASH

1. I am Jonathan Lash. I am a staff attorney with the Natural Resources Defense Council's Washington, D.C. office.

2. Plaintiff NRDC, a body corporate under the laws of the State of New York, was formed in 1969 as a nonprofit tax-exempt organization dedicated to the wise management of natural resources, enhancement of environmental quality, and reduction of health risks from pollution. In 1970, NRDC was determined by the Internal Revenue Service to be an organization described in section 501(c)(3) of the Internal Revenue Code and it has retained its tax-exempt status under that section since that date. NRDC has offices in New York, Washington, D.C., San Francisco, California, Natick, Massachusetts, and Denver, Colorado. It conducts its various activities through a salaried staff of more than 40 lawyers, scientists and other professionals.

3. NRDC engages in a broad program of natural resources and environmental protection activities. These include research and publication of information, public education programs, and participation in litigation and agency proceedings affecting environment and natural resources issues. The areas in which NRDC is currently active include air and water pollution, toxic substances control, drinking water safety, protection of natural areas, forestry, coastal zone and public lands management, and energy.

4. NRDC has participated in several hundred lawsuits in the federal and state courts of the United States, a similar

number of administrative proceedings, and public education and negotiations with industry. Many of these actions have resulted in more effective implementation of laws designed to protect the health and welfare of United States citizens and the natural resources of the nation. They have benefitted the health and welfare of individuals directly affected by the environmental practices at issue: For example: An NRDC suit brought with a group of community organizations in Tennessee resulted in a 50 percent reduction of sulfur dioxide emissions by TVA's power plants; NRDC conducted training workshops for citizens in local communities in many states to train them to participate in evaluation of surface water discharge permits resulting in improved compliance with standards—and safer water and fish—in their communities; NRDC has worked with local utilities to establish a zero-interest loan program for home weatherization; NRDC helped negotiate plans for clean ups of specific rivers polluted by industrial discharges; NRDC has successfully led the national campaign to reduce lead pollution from gasoline, which has the greatest health impact on urban children. In addition, NRDC's specific efforts have established administrative and legal precedents, practices, and requirements applied generally, with resulting direct benefits to the health and welfare of individuals in other areas.

5. The bulk of NRDC's effort is directed at effective implementation of environmental laws and regulations already in effect and reflecting established public policy. Only a small part of NRDC's effort is directed at affecting legislative decisions, and all such efforts are conducted within the applicable tax law rules, 26 U.S.C. § 501(c)(3) and (h), governing such activity by charitable organizations.

6. NRDC depends heavily on contributions from the public. In the past two years, NRDC received contributions from 40,000 individuals, in all 50 states and the District of Columbia.

7. NRDC has participated in the 1981 and 1982 CFC campaigns. In 1981, it participated in 19 local campaigns and has so far received contributions of $42,000. In 1982, it participated in 90 local campaigns. Funds from the 1982

campaign have not yet been tabulated or distributed to it. NRDC reasonably expects that if it is able to participate in more local campaigns and appeal on a continuing basis to federal workers, CFC will continue to be a significant source of support and a medium for conveying our message to a significant audience, namely federal civilian and military employees.

8. If NRDC was excluded from future Combined Federal Campaigns, it will be extremely difficult for us to reach the federal employee audience, and because of the costs of direct mail, a much greater proportion of revenue will have to go to fund raising activities, with the result that a smaller proportion of the organization's resources will be used for its program. The net result will be that federal employees and other individuals will receive fewer benefits from NRDC than if we were permitted to continue our participation in the Combined Federal Campaign.

/s/ Jonathan Lash

JONATHAN LASH

Sworn to and subscribed before
me this 29th day of March, 1983.

/s/ Dona Marie Wilcox

Notary Public

My commission expires: July 31, 1987

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS,

v.

HON. DONALD J. DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, by their undersigned counsel, move the Court for a preliminary injunction *pendente lite* for the purpose of maintaining the status quo, and requiring the defendants to process their pending applications for continued participation in the Combined Federal Campaign under the existing regulations insofar as they relate to eligibility as national service agencies. In support of this Motion plaintiffs would show the following:

1. Incorporated by reference as if fully set out herein is plaintiffs' Statement of Material Facts As to Which Plaintiff Contends There is No Material Issue.

2. Defendants have announced that new regulations pursuant to the revised Executive Order 12404 will be published for comment in April, 1983, with the intent of receiving applications sometime in May of 1983.

3. In 1982 new regulations were not published until July and applications not received and processed until late July. Similarly, in 1980 when plaintiffs were last denied participation in the Combined Federal Campaign, their applications were not finally decided upon until June. (See the affidavit of Charles Stephen Ralston.) By the time plaintiffs were able to come to court the result was that it was too late to obtain relief which would have allowed them to participate in that fall's Combined Federal Campaign. (See the order of the Court in *NAACP Legal Defense and Educational Fund, Inc.* v. *Campbell*, 504 F. Supp. 1365, 1369 (D.D.C. 1981).

4. Defendants have announced their intention to promulgate regulations which would result in the exclusion of the plaintiffs from further participation in the Combined Federal Campaign. (See affidavit of Phyllis McClure, and Exhibit A.) At the present time plaintiffs are entitled to participate and have filed applications under the existing regulation to continue their participation.

5. If plantiffs' applications are denied in May or June of 1983 the chances are great that by the time full court review is had they will not be able to complete the application process to local combined federal campaigns in time for inclusion in the fund-raising brochures for the Fall 1983 CFC. (See affidavit of Charles Stephen Ralston.) The result would be that plaintiffs would irretrievably lose the right to exercise their First Amendment rights of charitable solicitation for one year, and would irretrievably lose contributions from federal employees, which is expected to be in excess of $300,000. (See affidavit of Emanuel Owens).

6. Plaintiffs' continued inclusion in the Combined Federal Campaign pending the ultimate decision of their First Amendment rights would in no way interfere with the continued operation of the Combined Federal Campaign or injure the public or any other organization. Plaintiffs have participated in the Combined Federal Campaign for the last two years with no disruption of the campaign whatsoever. Further, large numbers of federal employees have exercised their right to contribute to the plaintiffs through the payroll deduction or direct contribution methods and they would be denied this right if plaintiffs were excluded this fall. (See affidavit of Emanuel Owens; Valerie V. Ambler) Defendants would suffer no inconvenience by simply having to continue to include the plaintiffs in the CFC. (See affidavit of Charles Stephen Ralston.) Thus, the effect of the relief sought herein would simply be to preserve the status quo pending the final resolution of plaintiffs' claims.

Plaintiffs request a hearing on this motion.

Respectfully submitted,
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/s/ Elaine Jones (CSR)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS

v.

HON. DONALD J. DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT

MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by their undersigned counsel, move the Court for Summary Judgment in their favor. The grounds for this Motion are set out in the affidavits filed with the Complaint, plaintiffs' Statement of Material Facts Not in Dispute, and their Memorandum of Points and Authorities filed herewith. They demonstrate that there are no material issues of fact to be resolved and that plaintiffs are entitled to judgment as a matter of law.

WHEREFORE, plaintiffs pray that they be granted summary judgment:

1. Declaring that the acts of defendant complained of herein violate plaintiffs' rights under the First and Fifth Amendments to the Constitution of the United States;

2. Declaring that the acts of defendant complained of herein are arbitrary, capricious, contrary to law, and that defendant has violated a duty owed to plaintiffs by so acting;

3. Enjoining defendant, his employees, agents, and successors in office, from refusing to approve plaintiffs as participating organizations in the Combined Federal Campaign;

4. Awarding plaintiffs their costs and reasonable attorneys' fees incurred here.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF MATERIAL FACTS AS TO WHICH PLAINTIFF CONTENDS THERE IS NO MATERIAL ISSUE

1. On January 19, 1981 this Court issued a memorandum opinion and order ordering that the defendant not deny pending or future applications of plaintiffs to participate in the Combined Federal Campaign on the basis of the "direct services" rule set out in the governing Manual for Fund Raising in the Federal Service. (504 F. Supp. 1365 (D.D.C. 1981).) As a result of that order plaintiffs were admitted to the Combined Federal Campaign for the campaigns held in 1981 and 1982. (Affidavit of Charles Stephen Ralston.) As set out more fully below plaintiffs received contributions from federal employees from their participations in those years. (Affidavits of Emanuel Owens; Robert L. Becker.)

2. In 1981 the defendant announced its intention eventually to amend or modify the existing manual provisions to limit the organizations allowed to participate in the Combined Federal Campaign in an attempt to comply with this Court's order. (Affidavit of Charles Stephen Ralston, Ex. B.) However, in 1982 the defendant revised the existing manual by issuing a superseding set of regulations which by their terms continued to permit the participation of the plaintiffs and other legal defense fund-type organizations. (29 C.F.R. Part 950.)

3. On February 10, 1983 defendant announced the promulgation of Executive Order 12404 which re-enacts a "direct services" rule. 48 F.R. 6685 (Feb. 15, 1983). The an-

nounced purpose of the "direct services" rule was to permit the exclusion of legal defense funds, including the plaintiffs, in an attempt to comply with the requirements of this Court's order. (Affidavit of Phyllis McClure, Ex. A.) The new executive order, a copy of which is attached to the complaint filed herein, again requires that participation in the Combined Federal Campaign shall be limited to organizations which provide direct services in the areas of health and welfare, and attempts to define these terms by, *inter alia* excluding so-called "political" organizations that seek to "influence ... the determination of public policy" through the bringing of litigation on behalf of "parties other than themselves."

4. The new executive order was announced at a press conference held by the Office of Personnel (OPM) at which the General Counsel of OPM issued a press release, a copy of which is attached to the accompanying affidavit of Phyllis McClure. (Ex. A.) In the press release and at the press conference it was specifically announced that legal defense funds that litigate for "causes" or for the purpose of "influencing public policy" would be excluded, while legal aid societies which provided legal services to all persons based on a need requirement would be included. At the press conference it was also stated that the NAACP Special Contribution Fund would be allowed to participate in the Combined Federal Campaign, while legal defense funds would not be allowed to participate. (Affidavit of Phyllis McClure; Ex. A.) It was further made clear that the purpose of the executive order was to attempt to overcome the vagueness found by this Court in the "direct services" rule of the earlier regulations. (Id.). This purpose was also explicitly stated in the memorandum sent by defendant to the White House on February 2, 1983, which explains the purpose of the new Executive Order (Affidavit of Charles Stephen Ralston, Ex. K.) The memorandum states that the new executive order will permit the exclusion of legal defense funds, and refers to the NAACP Legal Defense and Educational Fund by name. (*Id.*, Ex. K, pp. 3, 4.) However, it is also clear that the result sought to be achieved, i.e., the inclusion of legal aid societies and the NAACP

Special Contribution Fund while excluding so-called legal defense funds, was precisely the same as the result sought to achieved by the version of the direct service rule struck down in 1981. (Affidavit of Phyllis McClure, Ex. A).

5. It was also made clear at the press conference and in the materials attached to the press release, that the immediate genesis of the new executive order as was the supposed "controversial" nature of legal defense fund-type organizations. (Id.; Affidavit of Charles Stephen Ralston, Ex. F-H, K) Thus, in 1982 there was admitted into the Combined Federal Campaign a number of legal defense funds, including the National Right to Work Legal Foundation. Because of the positions and litigation brought by this particular foundation a number of labor unions and the AFL-CIO itself expressed concern and opposition to the inclusion of the organization in the Combined Federal Campaign. (Affidavit of Charles Stephen Ralston, Ex. F-G.) Although some unions called for a boycott of the Combined Federal Campaign the AFL-CIO urged that federal employees designate other organizations to receive their moneys so that no contributions would be given to the National Right to Work Foundation. (*Id.*, Ex. G.) This encouragement of designations was fully consistent with the regulations issued by the Office of Personnel Management which also encouraged federal employees to specify the particular organization to which their money should go. (5 C.F.R. §950.513.)

6. Following these events, in the early autumn of 1982 the executive board of the United Way of America passed a resolution urging the President to modify the executive order because of the alleged "controversy" that had arisen. (Affidavit of Charles Stephen Ralston, Ex. H.)

7. Despite the claims that the Combined Federal Campaign would be injured because of the alleged controversal nature of the legal defense fund, in fact, according to the Director of OPM, Dr. Donald Devine, and other OPM officials, contributions to the Combined Federal Campaign were up by 7% over the preceding years' receipts. (Affidavits of Charles Stephen Ralston; Phyllis McClure.) In fact, some local campaigns experienced substantial increases in receipts even though a fewer number of federal employees

were contributing. (Affidavit of Charles Stephen Ralston, Ex. I.). Indeed, the plaintiffs' experience has been that, based on initial limited information, giving to them increased substantially in 1982 over their first year's participation in the Combined Federal Campaign. (Affidavit of Emanuel Owens) In general, the organizations newly admitted will receive up to $4 million in contributions out of a total of over $100 million donated. Thus, it is clear that many federal employees, numbering in the tens of thousands, wish to and have exercised their First Amendment right to contribute their money through the payroll deduction method to the plaintiffs and similar organizations which will now be excluded from the campaign. (*Id.*) Preliminary reports from the Capital Area CFC for the 1982 campaign which covers the Washington, D.C. area, show that all legal defense funds had been pledged approximately $350,000 as of March 2, 1983. (Affidavit of Charles Stephen Ralston, Ex. J.)

8. For example, plaintiff, NAACP Legal Defense and Educational Fund, Inc., has received nearly $200,000 to date from the Combined Federal Campaign beginning in the fall of 1981. (*Id.*) Based on pledged amounts and projections, it will receive approximately $300,000 from the 1981 campaign and in the neighborhood of $340,000 from the 1982 campaign. (*Id.*) Other legal defense fund type organizations have received substantial contributions as well. (Affidavits of Valerie V. Ambler; Charles Stephen Ralston, Ex. J.) Thus, it is clear that, despite the claims of an alleged controvery, large numbers of federal employees wish to contribute to the plaintiffs and have exercised their right to do so. (*Id.*) If plaintiffs are cut off from this source of income, their programs will suffer and they will necessarily have to cut back their expenditures in furtherance of their activities which themselves are protected by the First Amendment to the Constitution of the United States. The impact on plaintiff FEW/LEF would be particularly severe. The organization's program is specifically directed towards the interest of federal employees. Through the CFC FEW/LEF has been able to raise sufficient funds to develop a full program. (Affidavit of Valerie V. Ambler.)

9. In the executive order itself and in the press release and statements issued at the time of the executive order's adoption it is clear that defendant has attempted to circumvent the earlier decision of the court by incorporating into the Executive Order and its interpretation the very rules which the court found inadequate to justify the barring of plaintiffs in 1981. (E.O. 12404; Affidavit of Phyllis McClure, Ex. A.)

10. Thus, defendant has again attempted to draw a distinction between legal aid societies and legal defense funds based on an understanding that legal aid societies accept all persons based on an income test regardless of the nature of their legal problems, while organizations such as plaintiffs only bring cases which are politically oriented and which have for their purpose affecting public policy. (*Id.*) This was specifically the rationale stated by the defendants in their letter of rejection of plaintiffs in 1980, cited by the court in its opinion of January, 1981. (504 F. Supp. at 1366)

11. Further, the defendants have announced that the Special contribution Fund of the NAACP will be admitted to the Combined Federal Campaign. (Affidavit of Phyllis McClure.) As held in the earlier decision of the Court the Special Contribution Fund conducts the same type of litigation activities as do the plaintiffs. (504 F. Supp. 1366-68; Affidavit of Jack Greenberg, Ex. L). The basis for the distinction in 1981 was that the Special Contribution Fund used a smaller proportion of its funds for litigation activities as compared to the plaintiffs. The court found that such an alleged rule was arbitrary and suffered from the same deficiency as that found by the Supreme Court of the United States in *Village of Schaumburg* v. *Citizens for A Better Environment*, 444 U.S. 620 (1979). (504 F. Supp. at 1368).

12. Finally, the proposed executive order attempts to distinguish between so-called advocacy agencies and organizations that do not engage in political activities. (see, Affidavit of Charles Stephen Ralston, Ex. K.) However, the plaintiffs are not advocacy organizations within the meaning of the Internal Revenue Code. (Affidavits of Jack Greenberg; Robert L. Becker; Valerie V. Ambler; Robert

T. Coulter; William L. Robinson) Rather, they have been recognized, for as long a period as 42 years in the case of the NAACP/LDF, by the Internal Revenue Service as providing valid, charitable activities within the meaning of Section 501(c)(3) of the code. (Affidavit of Jack Greenberg, Ex. L.; Affidavit of Robert L. Becker; Valerie V. Ambler; Robert T. Coulter; William L. Robinson.) Thus, as was held in 1981, such organizations conduct litigation on behalf of individual plaintiffs representing themselves and classes of persons, which litigation results in direct and immediate benefits in employment, health care, education and other areas being conferred on thousands of individuals, and provide other "direct services." (504 F. Supp. at 1368; affidavits of Jack Greenberg; Robert L. Becker, Valerie V. Ambler; Robert T. Coultier; William L. Robinson.)

13. Immediate relief is required to prevent the plaintiffs from suffering irrevocable harm in two respects. First, if they are again barred from the Combined Federal Campaign and are unable to obtain judicial relief in time for inclusion in the 1983 campaign, they will never be able to recoup the loss of revenues thereby suffered. (See, 504 F. Supp. at 1369.) Second, if they are barred they will irrevocably lose their right to exercise their First Amendment rights in the up-coming fall 1983 campaign.

14. The issuance of relief now will serve to preserve the status quo. The plaintiffs have participated in the last two Combined Federal Campaigns and are fully eligible to do so under the existing regulations. The new executive order provides that the existing regulations will remain in full force and effect until new regulations are promulgated. (E.O. 12404, § 2.) By requiring the defendant to process plaintiffs' present applications to remain in the Combined Federal Campaign the Court will, in fact, be simply preserving the status quo *pendente lite*.

15. The defendant, on the other hand, will suffer no injury whatsoever by being required to continue the Combined Federal Campaign as it has been conducted in the past two years. As set out above, there is no factual basis for any claim that the Combined Federal Campaign has suffered any damage or injury because of the plaintiffs' participation in the Combined Federal Campaign. Claims that the inclusion of allegedly "controversial" organizations would

result in lower giving, have proven to be speculative and unfounded. (Affidavits of Charles Stephen Ralston; Emanuel Owens; Valerie V. Ambler.)

Plaintiffs request a hearing on this motion.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
LOWELL JOHNSTON
10 Columbus Circle
Suite 2030
New York, N.Y. 10019
(212) 586-8397

/s/ Elaine R. Jones (CSR)

ELAINE JONES
BARRY L. GOLDSTEIN
BRENT SIMMONS
806 15th Street, N.W.
Suite 940
Washington, D.C. 20005
(202) 638-3278

JACK JOHN OLIVERO
ROBERT L. BECKER
Puerto Rican Legal Defense and Educational Fund, Inc.
95 Madison Avenue
New York, N.Y. 10157
(212) 532-8470

/s/ Norman J. Chachkin (CSR)

WILLIAM L. ROBINSON
NORMAN J. CHACHKIN
Lawyers' Committee for Civil Rights Under Law
733 15th Street, N.W.
Washington, D.C. 20005
(202) 628-6700

STUART J. LAND
Arnold & Porter
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0928

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS,

v.

DONALD J. DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT

DEFENDANT'S MOTION TO DISMISS

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, defendant respectfully moves this Court to dismiss this action for lack of subject matter jurisdiction as premature. As of this time, prior to the promulgation of implementing regulations and prior to any decisions on applications by organizations, including plaintiffs, for admission to the 1983 Combined Federal Campaign, there is no live, ripe case or controversy between plaintiffs and defendant and this action must be dismissed. A proposed order is submitted herewith in accordance with Local Rule 1-9.

Respectfully submitted,

/s/ Stanley S. Harris
STANLEY S. HARRIS
United States Attorney

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
Assistant United States Attorney

/s/ John D. Bates
JOHN D. BATES
Assistant United States Attorney

ATTACHMENT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0928

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS,

v.

HONORABLE DONALD J. DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT

AFFIDAVIT

P. Kent Bailey, being duly sworn, deposes and says:

1. I am the program analyst providing staff support to the Assistant to the Deputy Director for Regional Operations, United States Office of Personnel Management (OPM). The Office of the Assistant to the Deputy Director is the OPM office with primary responsibility for support to the Director of OPM in the administration of the Combined Federal Campaign (CFC). The statements made herein are based upon personal knowledge obtained in the course of performing the official duties assigned to me.

2. My office has periodically categorized and kept account of correspondence received on CFC issues. In addition, my office is the repository for the applications of organizations seeking to participate in the CFC as national voluntary agencies.

3. During and after the fall 1982 CFC, OPM received hundreds of letters from Federal employees, Federal agency heads, Chairmen of Federal Executive Boards, Chairmen of local Federal Coordinating Committees (organizations that administer local CFCs), members of Congress, unions, private voluntary organizations, and others concerning the inclusion of what most termed "political," "advocacy" or "non-traditional" voluntary organizations in

the fall 1982 CFC, or other matters concerning the operation of the CFC.

4. Of the letters we received, more than 80 percent asked that the CFC be restricted to "non-political," "non-advocacy" or "traditional" voluntary charitable organizations. Three percent requested that there be no restrictions. Thirty-four percent predicted that there would be a drop in CFC contributions and 18 percent stated a likelihood of CFC boycotts if participation in the fall 1983 CFC were not so restricted. (See, Exhibits 1-9, attached hereto, for samples of this correspondence.)

5. As of this date, OPM has received applications for the fall 1983 CFC from the Puerto Rican Legal Defense and Education Fund, Inc.; the NAACP Legal Defense and Educational Fund, Inc.; the Federally Employed Women Legal and Education Fund, Inc.; and the Indian Law Resource Center. OPM has not received applications for the fall 1983 CFC from the Lawyers' Committee for Civil Rights Under Law; the Sierra Club Legal Defense Fund, Inc.; or the Natural Resources Defense Council, Inc.

/s/ P. Kent Bailey
P. KENT BAILEY

Sworn to and subscribed before me this 8th day of April, 1983, in the City of Washington, District of Columbia.

/s/ Helen B. Welch
HELEN B. WELCH
Notary Public
My commission expires: 3/31/87

This year I have decided to forego contributing to CFC. I understand you want an explanation.

I have been a regular contributor since the days of the Community Chest. When the flap came over Planned Parenthood, I began to realize my contributions had become a mechanical action and that I had not asked how the program had expanded, which agencies were involved, how the money actually was distributed, or what the overhead costs were. After looking into these things I came to believe that this fundraising scheme has outlived its usefulness.

The total number of agencies is incredible. And the types! As an example, in no way in this world would I want to be included in any activity sponsoring "Conservative Legal Defense and Education Fund" or "National Right to Life Educational Foundation." However, I also can see no reason for organizations like "The Wilderness Society" or "Sierra Club Legal Defense Fund", which are dear to my heart, to be included in such a campaign. There are many worthy organizations on your list—and many more that could use some money that are not included. If I remember correctly, the initial idea for this fund raising included a few local charities and was to have one combined campaign for these so that we would not have repeated requests for money. I see many on your list that hit me up regularly. I think the time is past due to forget a combined fund, and contribute to those charities I specially choose.

So my decision is that I will split this usual $75 contribution between Planned Parenthood and the Salvation Army, and donate it directly and locally.

[Name blacked out]

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 375TH AIR BASE GROUP (MAC)
SCOTT AIR FORCE BASE, ILLINOIS 62225

7 February 1983

Received February 16, 1983
Office of the Director

Dr. Donald J. Devine, Director
Office of Personnel Management
Washington, D.C. 20415

Dear Dr. Devine

Mr. Clarance Squellati, Chairman of the 1982 East-West Gateway Campaign, wrote me concerning a January 6, 1983 CFC meeting held in Washington. He indicated that the future direction of the CFC was discussed at that meeting. I feel strongly that the CFC should only support health and welfare agencies.

The CFC drive at Scott Air Force Base met with considerable resistance this year because advocacy groups and agencies would be receiving campaign monies. All of us here at Scott believe these groups deserve citizen support but not through the CFC.

The Scott CFC campaign was an outstanding success in 1982 only because our project officers worked so industriously and diligently. I feel the present policy of allowing advocacy groups in the system will cause a decline in the support of the CFC. Please place special emphasis on retaining only health and welfare agencies in the CFC directory. By doing this, the CFC will remain vital and successful.

Sincerely

/s/ Gary K. Spencer
GARY K. SPENCER,
Colonel, USAF Commander

INTERNAL REVENUE SERVICE
DEPARTMENT OF THE TREASURY
P.O. BOX 1548, ST. LOUIS, MO. 63188

Received Feb. 23, 1983
Office of the Director

Dr. Donald J. Devine, Director
Office of Personnel Management
Washington, DC 20415

Dear Dr. Devine:

Each year, employees of the St. Louis District of the Internal Revenue Service are encouraged through the Combined Federal Campaign to designate their contribution to the agency of their choice to help preserve the essential levels of service offered by human care agencies.

The importance of affording agencies the opportunity to provide services for the needy and funds for research cannot be stressed enough. Unfortunately, many people withhold contributions, protesting the inclusion of advocacy agencies in CFC. We feel the present concept of allowing these agencies in the system will most certainly cause an ultimate decline of CFC as we know it. Several agencies have been forced to shut down due to a cutback in federal funding, and without the support offered by the CFC, others will soon follow.

The St. Louis District of the Internal Revenue Service does not encourage support of advocacy groups. Our campaign reinforces the need to recognize the vital human service agencies and to continue voluntary support to them.

Our position is that the true direction of the Federal Campaign is away from advocacy groups and toward health and welfare agencies. We therefore encourage a reevaluation of the criteria used for including organizations in CFC.

Sincerely yours,

/s/ Robert A. LeBaube
ROBERT A. LEBAUBE
District Director

UNITED STATES POSTAL SERVICE
OFFICE OF THE POSTMASTER

February 11, 1983

Received Feb. 18, 1983
Office of the Director

Donald J. Devine, Director
U.S. Office of Personnel Management
1900 East Street, NW
Washington, D.C. 20415

Dear Dr. Devine:

The Denver U.S. Postal Service is very much opposed to any of the special emphasis agencies being part of the Combined Federal Campaign. We would strongly recommend that CFC funds be limited to traditional health and welfare groups.

The pledges from Postal Service employees to CFC were not as high this year as last year. This drop is attributed to the fact that a craft union boycotted the Campaign due to the inclusion of a special emphasis organization.

The Denver U.S. Postal Service would recommend that a change be made in the criteria for acceptance of agencies into the Campaign to disallow those agencies that are not health or welfare oriented.

GARY L. PACKER
MSC Manager/Postmaster
Denver, CO 80202

cc: Norm Alverson, Chairman
Denver Federal Executive Board

HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

September 23, 1983

Received Oct. 1, 1982
Office of the Director

Mr. Donald J. Devine, Director
Office of Personnel Management
1900 E Street, NW, Room 5518
Washington, DC 20415

Dear Director Devine:

I want to convey to you my strong opposition to the Right-to-Work Committee being included as a recipient of funds from this year's Combined Federal Campaign.

The history of the C.F.C. has been one of raising funds from various government employees to support charitable services for those in need of such assistance. The inclusion of the Right-to-Work Committee as a recipient has injected politics into an area which the Congress never intended to become a focus for fostering a certain ideological viewpoint. The Right-to-Work Committee has no place in a fundraising campaign of this nature. I honestly feel that a very serious error in judgment has been made, one which needs to be addressed and corrected immediately.

I urgently await your response on this most important issue.

Sincerely,

/s/ Claudine Schneider
CLAUDINE SCHNEIDER, M.C.

CS:ftd

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

October 4, 1982

Received Oct. 5, 1982
Office of the Director

Mr. Donald J. Devine
Director
Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

Dear. Mr. Devine:

It has come to my attention that you have issued a ruling in connection with President Reagan's Executive Order No. 12353 allowing a number of special interest groups, which are not charitable and do not provide health and welfare services to needy citizens, to participate in the *Combined Federal Campaign*. Among these organizations are such groups as the National Right To Work Legal Defense Foundation.

I strongly urge you, Mr. Devine, to rescind this ruling which would divert money that is desperately needed to provide the basic services of medical care, shelter and adequate nutrition to so many of our citizens who live in need at this time of reduced federal funding of social programs. Organizations such as the National Right To Work Committee, whose purpose is solely to campaign for a change in the current legal status of labor unions and their members, should not be eligible to share in the charitable contributions given by federal workers who believe that their sacrifices are made for the worthy cause of aiding their less fortunate fellow citizens.

It is my feeling that your ruling to allow the Right To Work Legal Defense Foundation and similar groups to participate in the Combined Federal Campaign introduces a new concept into the Campaign which is entirely alien to the philosophy on which the Campaign is based, and I again urge you to reconsider your decision and prohibit such groups from receiving these funds.

I will look forward to hearing from you at the earliest opportunity.

Sincerely,

/s/ Fernand J. St Germain
FERNAND J. ST GERMAIN
Member of Congress

FJStG:dh

East 12806 Saltese Road
Spokane, WA 99216

September 22, 1982

Dr. Donald Devine, Director
Office of Personnel Management
Washington, DC 20415

Sir:

A shocking story recently came to my attention. You have authorized Political Action Groups to participate, as charitable organizations, in the Combined Federal Campaigns.

My first reaction was "UNBELIEVABLE" and—then—when I was convinced that this had happened, I must exclaim—"THIS IS TOTALLY WRONG!!!"

If you will contact the Attorney General, you will find that the Sierra Club Legal Fund and the Natural Resource Defense Council spend huge sums suing federal agencies and trying to block their programs. To confirm this, check with the Secretary of Energy, the Secretary of Interior, the Environmental Protection Agency, the Chief Engineer of the U.S. Corps of Engineers and the Chief Forester of the U.S. Forest Service.

Please tell me how these groups compare with the Boy Scouts, YMCA, Salvation Army, Project Hope, or any National Health Agency as charitable organizations!!

I need not further question your support of the Right to Work Committee's Legal Fund. Union Members across the nation have pointed out the fallacy of your decision to recognize that group as a charitable organization.

I am a retired federal employee. During my active career of 37 years, I spent nearly half of that time, as a Federal Executive, aggressively trying to build strong CFCs. I was proud of our successes. Your decision to allow political action groups into CFC has negated my efforts—with one directive.

Your decision does not appear to be compatible with the President's program to expand volunteerism. You should rescind your directive.

/s/ N. A. Gilchrist
NORMAN A. GILCHRIST

cc: U.S. SENATOR HENRY JACKSON,
SENATE OFFICE BUILDING,
WASHINGTON, DC 20510
U.S. CONGRESSMAN THOMAS FOLEY,
HOUSE OFFICE BUILDING,
WASHINGTON, DC 20515
NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES,
1533 NEW HAMPSHIRE AVE. NW, WASHINGTON, DC 20036

ATTACHMENT #1

FEDERAL EMPLOYEES' REACTION TO THE INCLUSION OF ADVOCACY ORGANIZATIONS AND SPECIAL INTEREST GROUPS IN THE 1983 CFC

The negative reaction from Federal employees to the inclusion of advocacy organizations and special interest groups in the Combined Federal Campaign this year has been unprecedented in volume compared to any other issue in the 19 years history of the CFC.

Normally during the fall campaign period the CFC headquarters receives 350 to 500 telephone calls of a complaint nature, covering a wide range of issues, including the distribution of funds, the inclusion of certain organizations, and campaign materials and procedures.

This year the CFC office received approximately 1,800 telephone calls of a complaint nature, with approximately 1,450 expressing dissatisfaction with the inclusion of advocacy and special interest organizations in this year's campaign. The office received very few, if any, calls supporting the inclusion of such organizations.

Some callers stated they were not contributing this year and would not again until the CFC returns to its former status as a supporter of health and welfare service agencies. Other callers were persuaded to make contributions this year upon learning that the legal defense funds had been included because legally there was no option and that organizations belonging to the National Service Agencies federation would receive designations only. Many callers were keyworkers and campaign leaders advising that this issue was the primary cause for lower participation and disappointing campaign results.

In addition to telephone calls, the CFC office received a number of letters from Federal employees expressing dissatisfaction about the inclusion of advocacy and special interest groups. Copies of representative letters are attached.

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 10, 1982

The Honorable Drew Lewis
Secretary of Transportation
Department of Transportation
400 7th & D Street, S.W.
Room 10200
Washington, D.C. 20510

Dear Secretary Lewis:

We recently concluded the Federal Election Commission's drive in connection with the 1983 Combined Federal Campaign. While more than 50% of our employees participated in this year's campaign, we did not attain the dollar goal established for us despite the strong efforts of a diligent Campaign Chairman and despite the fact that I also made a number of personal appeals to employees.

The primary reason for our inability to reach this year's goal was the widespread dissatisfaction with what many employees perceived as the interference of the Office of Personnel Management in the process. I am not arguing the merits of these allegations, but merely wish to call to your attention the fact that this perception severely damaged our efforts, even though I and our Campaign Chairman went to great lengths to point out the earmarking possibilities and the fact that no contribution would be made to national service agencies unless they were specifically designated for such agencies.

Commission employees remain deeply committed to the causes represented by this Campaign, but I firmly believe that this charitable effort will continue to suffer unless and until we convince potential contributors that the drive is devoid of political considerations. I note that this is not an expression of any official Commission position, but instead constitutes merely a reflection upon the experience of this year's campaign at the FEC as seen through the eyes of one genuinely concerned over the success of future campaigns.

Sincerely,

/s/ Frank P. Reiche
FRANK P. REICHE
Chairman

FPR:bt

cc: Mr. William Schaeffler
Director
Combined Federal Campaign
2100 M Street, N.W.
Room 12, Lower Level

1983 COMBINED FEDERAL CAMPAIGN

Dear CFC:

Once again I object to the listing of non charitable agencies in this campaign.

I object to all of the *defense* and *educational funds*. Who is it that considers these political action groups a charity? I do not and have reduced my contribution in protest to the lowest possible payroll deduction.

A plague on the dim wits who have allowed those lobbyists to dilute the CFC effort.

Sincerely,

/s/ [Illegible]

703-756-6365

Nov. 12, 1982

To Whom It May Concern:

I object to the plethora of organizations that have been included in the CFC which are not directed to the needy. There are too many such organizations which reflect special interest groups, for example:

The Pacific Legal Foundation

The Conservative Legal Defense and Education Fund

The National Right to Work Legal Defense Foundation.

Instead of contributing to the CFC this year, I will donate selectively to individual organizations.

/s/ [Illegible]

November 29, 1982

Mr. William Schaeffler
Director, Combined Federal Campaign
2100 M Street, N.W.
Lower Lobby, Room 12
Washington, D.C. 20037

Dear Mr. Schaeffler:

Political lobbying groups may serve a useful purpose in our society, but they do not deserve the support of the Combined Federal Campaign (CFC).

The CFC was formed, as it states in the brochure, to identify deserving charitable organizations and to encourage Federal employees to support their work. Charity, as most of us would agree, involves providing food, clothing and shelter to the needy, alleviating the suffering of the sick, and offering basic services to the disadvantaged.

The money collected in the name of charity should not be placed in the hands of political groups, regardless of their orientation. To do this cheapens the good intentions of all who donate a portion of their work to charitable giving.

I therefore protest the inclusion in the CFC of any group whose work does not conform to the ideals of charitable giving.

Sincerely yours,

/s/ Jeff Nolder

JEFF NOLDER

30 Grafton St.
Chevy Chase, MD 20815
November 22, 1982

Combined Federal Campaign
95 M St.
Washington, D.C. 20024

Dear Sirs:

For the six years that I have worked for the Federal government, I have been a staunch supporter of the Combined Federal Campaign.

This year, however, I will not contribute through CFC, and I thought you might like to know why.

The Combined Federal Campaign has been so politicized over the past year by OPM director Donald Devine, that it now represents a weapon to be used in accordance with his views rather than a vehicle for charitable contributions. His strong-arming of the CFC has caused me to loose my trust in it as a reliable, neutral philanthropy. I will, instead, donate my money directly to charities of my own choosing.

If you find that this year's level of contributions does not meet previous years, you might conclude that my feelings are not unique, that other civil servants have withdrawn their support for the same reason.

I am sending a copy of this letter to Mr. Devine.

Sincerely,

/s/ Alice Shabecoff
ALICE SHABECOFF

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

August 13, 1982

Received AUG 16, 1982
Office of the Director

Mr. Donald J. Devine
Director
Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

Dear Mr. Devine:

I am writing to you about the Combined Federal Campaign and my concern about some of the National Service Agencies included in the program. While I recognize that federal workers have the right to select the charity(ies) to which they want their contribution to go, I don't feel many of these groups are what I consider "charitable" organizations. For instance, the Center for Auto Safety, Federally Employed Women Legal and Education Fund, Conservative Legal Defense and Education Fund, Lawyers' Committee for Civil Rights Under Law, National Audubon Society, National Right to Life Educational Trust Fund, National Right to Work Legal Defense Foundation, Pacific Legal Foundation, Sierra Club Legal Defense Fund, etc., while all are certainly admirable organizations and do provide services to their members, I'm not certain they meet my determination of a charitable organization that provides assistance to the poor, needy and victims of disasters, and I think a lot of federal workers would probably agree with me. Furthermore, many of the groups I have named above have lobbyists on their staffs and it would appear that their charitable work is more along political lines than service to those in need lines.

I know that the Combined Federal Campaign has come under a lot of fire lately, and I certainly don't want to cause any additional problems. But, I would very much appreci-

ate having your rationale on how OPM monitors these questionable groups, at least questionable to me, with regard to what they do with the funds they receive from the CFC. Your comments would be appreciated, and I will look forward to hearing from you at your earliest convenience.

Sincerely,

/s/ G. William Whitehurst
G. WILLIAM WHITEHURST

GWW:DTW

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

November 9, 1982

Received NOV 15, 1982
Office of the Director

Mr. Don Devine, Director
Office of Personnel Management
Washington, D.C. 20415

Dear Mr. Devine:

I am very concerned over the unnecessary controversy over the Combined Federal Campaign program. The admission of politically controversial and noncharitable agencies have hurt the fundraising goals of the 1983 campaign for many local areas, such as the Bremerton-Kitsap County area in the State of Washington.

Unfortunately with the recent changes in eligibility guidelines and admissions, there are many noteworthy agencies, such as the Bremerton-Kitsap County Home Health Services in Bremerton, Washington and the Kitsap County Indian Center in Silverdale, Washington, that have expressed their deep concern over the threat of discontinuing their operations because of the lack of contributions they project from CFC. Many federal workers who want to voluntarily support health and social service agencies, may not contribute to the CFC drive this year. The inclusion of many non-charitable, political agencies in the CFC program are definite disincentives for contributions. This controversy is unfortunate and should never have happened.

At a time when the Administration is encouraging volunteerism at the local level in dealing with our country's problems and reducing government expenses on important social programs, these new, controversial guidelines are having adverse effects, threatening needed contributions to traditional charities.

I join many of my colleagues and friends and urge you to reconsider the admission of these non-charitable organizations in the Combined Federal Campaign program. I look forward to hearing from you. Best regards.

Sincerely,

/s/ Al Swift
AL SWIFT
Member of Congress

AS:ro

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

December 16, 1982

Mr. Don Devine, Director
Office of Personnel Management
1900 E Street, N.E.
Room 5H09
Washington, D.C. 20415

Dear Don:

As chairman of the Federal Coordinating Committee for the Combined Federal Campaign of the National Capitol Area, I would like to express a concern of the committee which has had an adverse effect on this year's campaign.

At the full committee meeting on August 18, 1982, many members reacted negatively to the inclusion of groups in the campaign which they believed did not provide direct health and welfare services, particularly the "Legal Defense Funds." In an effort to start the campaign on schedule,however, the committee voted to include these organizations, and a subcommittee was formed to study these issues. During the campaign it became clear that many potential contributors also objected to the inclusion of these organizations. I have enclosed a resolution adopted by the Executive Committee on behalf of the full committee on December 15, 1982, expressing the committee's concerns and requesting that the campaign only include "voluntary agencies providing direct health and welfare services."

I believe these concerns are valid and must be addressed.

Sincerely,

/s/ Clarence Thomas
CLARENCE THOMAS
Chairman

Enclosure

RESOLUTION

The Federal Coordinating Committee for the Combined Federal Campaign of the National Capitol Area is authorized by Federal regulations (5 CFR Part 950.211) "... to make all decisions within the provisions and policies established in this Part on all aspects of the local campaign, including eligibility and the supervision of the local community campaign and the Principal Combined Fund Organization."

The Federal Coordinating Committee for the National Capitol Area is composed of 34 members from 27 Federal departments and agencies, representing 85 percent of the total Federal workforce in the National Capitol Area, and officials from six labor unions representing Federal employees. Most of our members have been directly involved in the planning and conduct of department and agency campaigns this fall.

Exercising the responsibility we have, and reflecting what we believe to be the overwhelming view of Federal employees,

> *we urgently call for revisions to the Executive Order and derivative regulations concerning the CFC to reestablish the campaign solely for support of voluntary agencies providing direct health and welfare services.*

The inclusion of other types or organizations, such as those involved exclusively in the promotion of and/or advocacy for special groups and/or causes, has seriously undermined the integrity of the CFC in the view of many thousands of Federal employees (see attachment #1). More specifically, it has damaged this year's campaign effort (see attachment #2) and, if not checked, will destroy the effectiveness of future campaigns.

As a group of senior Federal employees and labor union representatives, we have worked diligently to raise funds for all organizations now qualifying under the existing criteria. In the process we have encountered anger and frustration from potential contributors, and widespread disappointment among coordinators and keyworkers unable to meet their goals because of employee resistance to supporting organizations other than those voluntary agencies providing direct health and welfare services. The designation process has proved to be an inadequate means to alleviate contributor resistance. We conclude that immediate revision of criteria for inclusion in the CFC is the only way in which this resistance can be eliminated and the image of the CFC as a charitable cause be restored. Consequently, we strongly recommend the most expeditious action possible to redefine the criteria for organizations to qualify for CFC support. We believe firmly that the needs of our community and the people deserving health and welfare services are too great and too important to allow CFC's ability to meet those needs to be undermined further by controversy over organizational participation.

1983

FEDERAL FUND RAISING PROGRAM COORDINATING COMMITTEE FOR THE NATIONAL CAPITAL AREA

Mr. Clarence Thomas—*CHAIRMAN*
Chairman
Equal Employment Opportunity Commission

Mr. Gregory J. Ahart
Assistant Comptroller General for Human Resources
General Accounting Office

Mr. Richard A. Ashworth
Assistant Secretary for Administration, Acting
Department of Agriculture

Ms. Arlene Triplett
Assistant Secretary for Administration
Department of Commerce

Mr. David O. Cooke
Deputy Assistant Secretary for Administration
Department of Defense

Mr. William S. Heffelfinger
Assistant Secretary for Management and Administration
Department of Energy

Dr. John P. Horton
Assistant Administrator for Administration
Environmental Protection Agency

Mr. Raymond A. Fontaine
Assistant Administrator for Plans, Programs and Financial Management
General Services Administration

Mr. David Newhall, III
Chief of Staff
Department of Health and Human Services

Mr. Stephen May
Assistant Secretary for Legislation and Congressional Relations
Department of Housing and Urban Development

Mr. Kevin D. Rooney
Assistant Attorney General for Administration
Department of Justice

Mr. J. Robinson West
Assistant Secretary for Policy, Budget and Administration
Department of Interior

Mr. Alfred M. Zuck
Assistant Secretary for Administration and Management
Department of Labor

Mr. Walter C. DeVaughn
Assistant Public Printer for Management and Administration
Government Printing Office

Mr. Peter K. Hatt
Director of Headquarters Administration
National Aeronautics and Space Administration

Mr. Steven Leavey
General Manager, Headquarters Personnel Division
U.S. Postal Service

Mr. Richard T. Kennedy
Under Secretary for Management
Department of State

Ms. Cora P. Beebe
Assistant Secretary for Administration
Department of Treasury

Mr. Robert L. Fairman
Assistant Secretary for Administration
Department of Transportation

Mr. Dennis Kenneally
Associate Deputy Administrator for Administration (006)
Veterans Administration

Mr. Joseph S. Patti
Assistant to the Director
Office of Personnel Management

Mr. Ernest L. Hardt
Deputy Director of Personnel for Special Programs
Central Intelligence Agency

Mr. James T. Hackett
Associate Director for Management
International Communication Agency

Mr. John R. Bolton
Assistant Administrator for Program and Policy Coordination
Agency for International Development

Mr. Elam K. Hertzler
Executive Assistant/Chief of Staff
Department of Education

Mr. William J. Dircks
Executive Director for Operations
Nuclear Regulatory Commission

Mr. Glen A. Zimmerman
Associate Librarian for Management
Library of Congress

Mr. Donald M. McIntyre
National Vice President of the 14th District
American Federation of Government Employees

Mr. Douglas Holbrook
General Secretary/Treasurer
American Postal Workers Union

Ms. Cynthia Denton
Attorney
National Association of Government Employees

Mr. Halline Overby
Assistant Secretary/Treasurer
National Association of Letter Carriers

Mr. Eugene Raymond
Executive Director
National Federation of Federal Employees

Mr. Erie Doyle
Director of Labor Relations
National Alliance of Postal and Federal Employees

Mr. Thomas S. McFee (ex-officio)
Assistant Secretary for Personnel Administration
Department of Health and Human Services

JULY 1, 1982

DEPARTMENT OF STATE
WASHINGTON, D.C. 20520

October 15, 1982

1983 Combined Federal Campaign
National Capital Area
95 M Street, S.W.
Washington, D.C. 20024

Dear Sir:

I have contributed at least a small sum regularly over the years to the CFC. This year I took a look at the list of agencies supported and found that the disadvantaged and poor form probably a minority of the recipients. I don't know why I should support political action groups under the guise of direct help to unfortunate people. I really feel taken, and won't again.

Disappointedly

/s/ Charles W. Reynolds
CHARLES W. REYNOLDS
Foreign Service Officer
Department of State

1600 Crestwood Drive
Alex., Va. 22302
28 October 1982

1983 Combined Federal Campaign
National Capital Area
95 "M" Street S.W.
Washington, D.C. 20024

Dear Sir:

I have very serious reservations about contributing to "CFC" this year. Despite the fact that there are many worthy causes, the trend to add groups which are not charitable is ridiculous.

Instead of not contributing at all, I have decreased my gift to less than 30% of last years (which also was less than the previous years). Next year it will be zero unless CFC returns to its original purpose, i.e., raising money for charity or charitable purposes.

Disgustedly yours,

/s/ Cathey H. Hildebrandt
CATHEY H. HILDEBRANDT

ATTACHMENT #2

ANALYSIS OF 1983 COMBINED FEDERAL CAMPAIGN OF THE NATIONAL CAPITAL AREA

Despite unprecedented positive support from the President and leaders of the Administration this year, the 1983 Combined Federal Campaign of the National Capital Area will probably experience an increase of only five per cent in funds raised and a decrease of 5,000 to 10,000 contributors (See Table #1). Many of those who decided not to support the CFC this year and who reduced their levels of support did so in protest against the inclusion of one or more of the advocacy and special interest organizations in the CFC this year.

Due at least in part to the increasing dissatisfaction with the entire package of CFC supported agencies, this year's campaign experienced a dramatic increase in designated contributions and an almost equal decrease in undesignated contributions (See Chart #1). While many contributors designated their gifts deliberately and positively to support certain preferred agencies, a large but unquantifiable number designated their gifts in a negative sense to insure their gifts would not support a few disliked agencies. It is not the general intention of those in the latter group to deny support to all but a few organizations in the CFC, but that is the result necessitated by the current designations procedure.

The significant increase in designations this year (from 50% to 70% of the entire campaign in a single year) will most seriously impact the 193 United Way/United Black Fund agencies (of a total of 290 in the CFC), which will receive $600,000 to $700,000 *less* support from the CFC than last year. Many of the United Way/United Black Fund agencies are small in size, have limited community visibility and are not involved in programs which create high emotional support (such as research in the areas of dread diseases). These organizations traditionally have received the largest portion of their support from undesignated, general contributions. The United Way/United Black Fund has received 93% of the pool of undesignated funds in recent years, and 60% to 65% of designated funds.

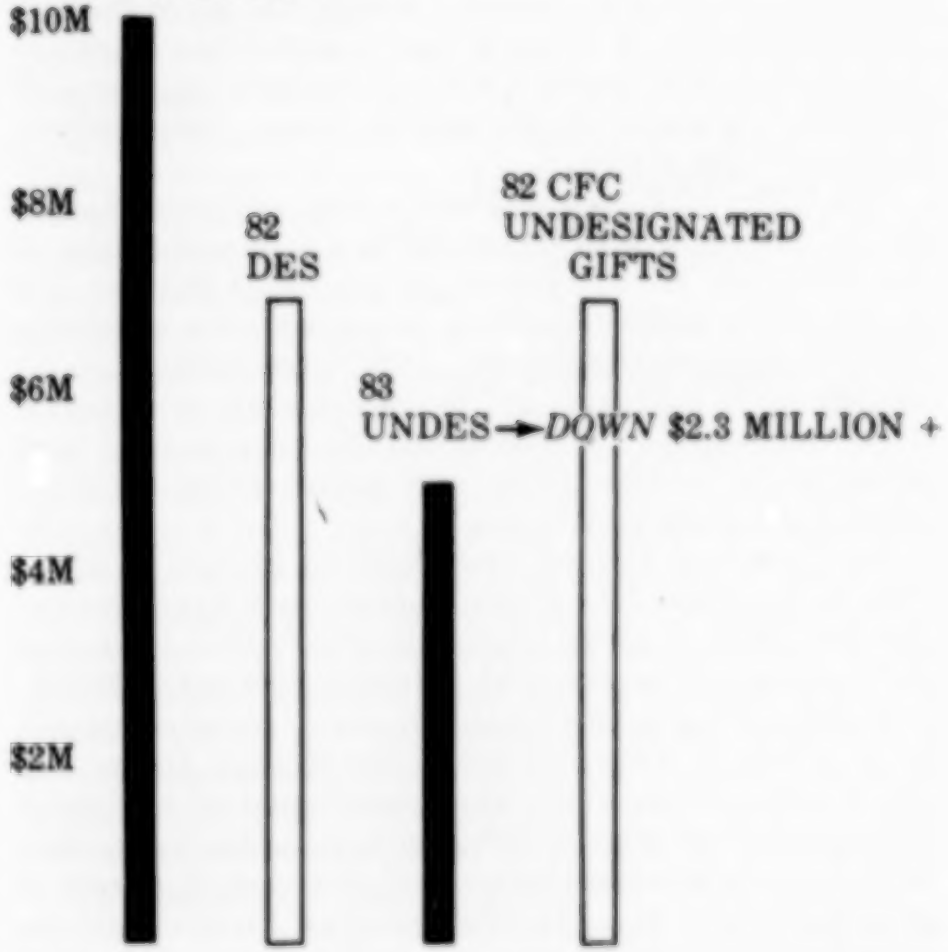
While the United Way/United Black Fund agencies probably will receive approximately $1.5 million more in designated contributions this year, the loss of support from the significantly decreased pool of undesignated funds probably will exceed $2.1 million, causing a net loss of between $600,000 and $700,000.

ATTACHMENT #2

TABLE #1 Comparison of 1982 and 1983 Combined Federal Campaigns

	$'s Raised	*# Givers*	*% Increase*
83 CFC (fall 1982)	$14,500,000(est.)	224,000(est)	+ 5%
82 CFC (fall 1981)	13,781,000	231,000	+11%
	+$ 719,000	− 7,000	

CHART #1 Designated and Undesignated Gifts in 82 and 83 CFC's



STATEMENT OF
DONALD J. DEVINE, DIRECTOR
UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
BEFORE THE
SUBCOMMITTEE ON MANPOWER AND HOUSING
OF THE
COMMITTEE ON GOVERNMENTAL OPERATIONS
OF THE
UNITED STATES HOUSE OF REPRESENTATIVES
MARCH 24, 1983

MISTER CHAIRMAN AND MEMBERS OF
THE SUBCOMMITTEE:

The Combined Federal Campaign is a remarkable institution. It is an important source of support for the private, voluntary, health and welfare charities that serve the people of this nation. It is also a major outlet of the charitable impulse that runs deeply in Federal workers, whether civil servants, members of the armed forces, congressmen, judges, or their staffs.

The Office of Personnel Management has been charged by the President with responsibility for administration of the Campaign. We are grateful to you, Mr. Chairman, and to this Subcommittee for being interested in the Campaign and for convening this hearing. Today's proceeding calls attention to the Campaign and to the important work that it does, and permits a discussion of the reforms—the most important in its twenty-two year history—that the Campaign is presently undergoing.

The Combined Federal Campaign was brought to life in 1961 by President John F. Kennedy through Executive Order No. 10927. Charity appeals in the Federal workplace did not begin, however, with President Kennedy's Executive Order. Prior to that Order, charities conducted appeals in a variety of ways in Federal installations around the world. Some solicitations were coordinated with Federal managers; others were undertaken on an ad hoc basis, often with no greater sophistication than the passing around of an empty coffee can. The heads of some Federal facilities permitted no solicitations whatsoever; at other Federal

worksites, no restrictions were imposed, and it was not uncommon for a collection to be taken up each week on behalf of one charity or another.

As the number and variety of appeals increased, however, so did the problems. Feelings were often bruised, and ill will resulted. Voluntary agencies could not understand why they were allowed to solicit in some Federal establishments and not in others, nor did they appreciate the fact that some charities seemed to have the support of Federal management, while other charities were allowed, at most, to collect passively by the placement of an unattended contribution jar in an obscure corner of a lunchroom. And Federal employees, for their part, were often made unhappy by repeated solicitations that seemed to abuse their philanthropy.

As a result, President Kennedy directed that all ad hoc solicitations be ended, and that worthy charities be permitted to solicit in the Federal workplace through a single, annual drive combining all participating agencies. Thus was born the Combined Federal Campaign. Responsibility for its execution was vested at the outset in the Civil Service Commission. That responsibility has passed to the Commission's successor institution, the United States Office of Personnel Management.

President Kennedy's Order directed that the Campaign be open to "national, voluntary health and welfare agencies and such other national agencies as may be appropriate." For nearly twenty years, this criterion proved to be of little controversy. Everyone seemed to understand that the Combined Federal Campaign was intended to support the traditional kinds of charities that undertake research into the causes and cures of dread diseases or that render health and welfare services directly to needy people. The world of not-for-profit organizations had always included many other kinds of groups and institutions, of course, ranging from private schools and universities to opera guilds, sports associations, recreation societies, and many more, including the newer "advocacy groups" such as legal defense funds and public policy research organizations, all of which number today in the many tens of thousands. But it had never

been thought appropriate—and certainly not practical—for these kinds of institutions to participate in the Combined Federal Campaign, especially since they were not engaged in supplying health and welfare services directly to human beings who were ill, infirm, poor, or distressed, thereby lessening the burdens of government in meeting such needs.

Thus, until 1980, the Civil Service Commission and the Office of Personnel Management confined participation in the Campaign to health and welfare charities. In that year, however, the United States District Court for the District of Columbia, acting on the petition of two legal defense funds, held that the eligibility criteria set forth in President Kennedy's Executive Order and in the ground rules adopted under it by the Commission were not precise or clear enough to sustain such an admissions policy. The court upheld the claims of the two legal defense funds that, based on the rules as they were then written, the exclusion of "advocacy" groups from the Campaign constituted an improperly confined exercise of discretion by OPM. In his decision, however, Judge Gerhard Gesell by no means declared that the CFC had to be opened to any not-for-profit agency that applied. Rather, he simply called upon OPM to clarify the rules. As he stated: "(i)t behooves the government officials responsible for the program to re-examine the basic premises on which the program was established so that more acceptable standards can be developed which will assure continuation of the government's significant and useful support for worthy charitable solicitation."

Subsequent to Judge Gesell's Order, and with the hope of reducing the potential for further litigation, new and different organizations were admitted to the Campaign at a very rapid rate in 1981 and 1982. Many of these were legal defense funds and advocacy groups, such as the NAACP Legal Defense and Educational Fund, Inc., the Conservative Legal Defense and Education Fund, the Puerto Rican Legal Defense and Education Fund, the Center for Auto Safety, the National Organization for Women Legal Defense and Education Fund, and the National Right to Work Legal Defense and Education Fund.

At the same time, participation in the Campaign by these groups provoked increasing concern and even outright hostility. Complaints started coming in to OPM—slowly at first, in a torrent by the end of the 1982 Campaign—that we were "politicizing" the CFC. Federal workers across the country, Federal executives charged with overseeing the Campaign and insuring its success, union rank-and-file, union leaders, traditional health and welfare charities, large and small, Congressmen, and countless members of the public all complained in overwhelming numbers that the inclusion of advocacy and political groups would destroy the spirit and cooperation necessary to a successful Campaign, and would thereby kill it.

These matters came to a head in 1982 when many Federal workers and their organizations threatened to boycott the Campaign, and in some cases carried out those threats. In Bremerton, Washington, for example, Campaign contributions were off from last year by 12 percent due to union boycotts, which spilled over, by the way, to effect the private United Way Campaign there as well. In Cleveland and Colorado Springs, the Campaigns were off by over 10 percent; in Boise, Idaho, the figure was nearly 20 percent. This is money that will not be going to the poor and the needy in these communities. As employees told us in letter after letter, they were outraged, and not without justification, that the resources of the Government—including the volunteered duty time of thousands of Federal employees who serve as key workers in their installations all across the globe—were being deployed in aid of organizations that were not rendering health or welfare services but instead were propagating the views of political, social, and partisan causes. Only the active intervention of responsible leaders of employee unions, of Federal managers, and in many instances of Congressmen, prevented the 1982 boycotts from taking fire and kept the 1982 Campaign from being an unmitigated disaster.

Not surprisingly, therefore, at the close of the last Campaign letters by the hundreds came pouring in to the White House and OPM, urging that the CFC be restored to its health and welfare footing, and admonishing us that the re-

markable exertions of 1982 could not be sustained in the future. We were told, in no uncertain terms, that unless the Campaign were reformed, employee boycotts—some concerted, others passive, but all of them devastating—would bring the life of the Campaign to an end. With my written testimony, I have submitted for the Subcommittee's consideration a small sampling of this correspondence. Let me take a moment here to share with you some of the Congressional sentiment on the matter.

I can confidently assure this Subcommittee that the Congressional response to the 1982 inclusion of political and ideological groups has been overwhelmingly broad based, bipartisan, and almost universally negative. For example, Republican Congresswoman Claudine Schneider writes, in her letter of September 23, 1982, that "[t]he history of the CFC has been one of raising funds from various government employees to support charitable services for those in need of such assistance. The inclusion of the Right to Work Committee as a recipient has injected politics into an area which the Congress never intended to become a focus for fostering a certain ideological viewpoint. The Right to Work Committee has no place in a fundraising campaign of this nature. I honestly feel that a very serious error in judgment has been made, one which needs to be addressed and corrected immediately." Similarly, in his letter of October 4, 1982, Congressman Fernand J. St. Germain writes: "I strongly urge you, Mr. Devine, to rescind [these changes] which would divert money that is desperately needed to provide the basic services of medical care, shelter and adequate nutrition to so many of our citizens who live in need at this time of reduced federal funding of social programs." Again, in his letter of October 8, 1982, Congressman Norman Dicks, in clear and unambiguous language, writes "I strongly urge you to reconsider your position and to support deletion of political groups from the CFC." In an earlier letter, dated September 30, 1982, Congressman Dicks had expressed the opinion that "[t]he CFC was intended to provide needed funds for health and human service organizations, not to involve itself in ideological battles on political issues." I have received similar letters

of opposition or expressions of concern on behalf of constituents from many other members of Congress, including Congressmen Floyd Fithian, Mary Rose Oakar, William Brodhead, G. William Whitehurst, Andy Jacobs, Olympia Snowe, Doug Walgren, and Senators Henry Jackson, Charles Percy, Arlen Specter, Gordon Humphrey, Slade Gorton, and Ted Stevens.

It was against this background that President Reagan considered the purposes, problems, and methods of the Combined Federal Campaign, and has, this year, issued a new Executive Order that goes to the heart of the matter. For the first time, a President has clearly articulated the Campaign's objectives. As the President declared, they are: "...to lessen the burdens of government and of local communities in meeting needs of human health and welfare; to provide a convenient channel through which Federal public servants may contribute to these efforts; to minimize or eliminate disruption of the Federal workplace and costs to Federal taxpayers that such fund-raising may entail; and to avoid the reality and appearance of the use of Federal resources in aid of fund-raising for political activity or advocacy of public policy, lobbying, or philanthropy of any kind that does not directly serve needs of human health and welfare."

In furtherance of these objectives, then, the President has accepted Judge Gesell's invitation and has provided precise criteria of admission to and exclusion from the Campaign. The Campaign is to be open to "...voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families. Such direct health and welfare services must be available to Federal employees in the local campaign solicitation area, unless they are rendered to needy persons overseas. Such services must directly benefit human beings, whether children, youth, adults, the aged, the ill and infirm, or the mentally or physically handicapped. Such services must consist of care, research, or education in the fields of human health or social adjustment and rehabilitation; relief of victims of natural disasters and other emergencies; or assistance to those who are impoverished and

therefore in need of food, shelter, clothing, education, and basic human welfare services." Meanwhile, the President has provided expressly that "(a)gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves shall not be deemed charitable health and welfare agencies and shall not be eligible to participate in the Combined Federal Campaign."

In summary, in response to an outpouring of criticism—from Federal employees and executives, from both the military and the civilian sectors, from employee unions and union leaders, from charities large and small, and from Congress and members of the public—the President has put the Campaign back on its feet and has taken the measures that will insure its success in the future. As indicated by the attached editorials from the *Washington Post* and the *Minneapolis Star and Tribune*, these changes are already receiving editorial support. The Combined Federal Campaign and the good work it does are thoroughly deserving of the support of the Federal workforce. We know that the Campaign also has the support of Congress and of this Subcommittee, and for that, Mr. Chairman, we are abidingly grateful.

I shall be happy to respond to any questions the Subcommittee may have.

THE WASHINGTON POST—Sunday, February 20, 1983

WHERE YOUR CHARITY MONEY GOES

How you do—or don't—give money to charities is your private business, but many of us have certain strong opinions about which agencies are most deserving and which have more to do with political and legislative objectives than with direct health and welfare care for people in need. And when it comes to the annual one-fund campaigns—the local United Way and, in government, the giant Combined Federal Campaign—the decisions on what groups to include becomes even more touchy. Where do you draw any line?

President Reagan has just redrawn one—ordering that the Combined Federal Campaign be limited in the future to voluntary organizations directly involved in health and welfare activities. It is a sensible and important decision for the local health and welfare agencies, even though it is drawing sharp criticism from a broad range of groups that you may know and love, or dislike intensely, that now find themselves off the one-fund recipient list.

It all came to a head last year, when a court order permitted the National Organization for Women Legal Defense Fund to participate in this year's CFC drive. That opened the door to all sorts of organizations—from the National Right to Life to Planned Parenthood to the National Right to Work Legal Defense and Education Foundation—to get in on the campaign, payroll deductions and all. This then sparked boycotts by various unions, protests from across the spectrum and—here's the worst part—less money for the local health and welfare agencies that benefit from the United Way and CFC campaigns.

In response to a request by the United Way of America, federal employee organizations and labor unions, President Reagan has ordered expressly excluded from the CFC "any organization that seeks to influence elections or public policy determinations through political activity or advocacy, lobbying or litigation on behalf of parties other than itself," according to Donald Devine, director of the Office of Personnel Management. As Mr. Devine notes, federal workers

"remain absolutely free, of course, to contribute to such organizations if they wish, but the taxpayers will not be asked to provide the fund-raising channel."

Fair enough. The government, through the CFC, should not be a collection agent for clearly political groups. That kind of "charity" begins at home, or someplace else.

MINNEAPOLIS STAR AND TRIBUNE—
Friday March 4, 1983

KEEPING CHARITY WHERE IT BELONGS

President Reagan has directed that federal workers' payroll-deducted charitable contributions go only to voluntary health and welfare groups. His wise action removes an unfortunate pall from national charity drives.

Last fall, Twin Cities unions representing federal workers caused a ruckus by boycotting the 1982 United Way campaign. Their grievance wasn't with United Way, but with the Combined Federal Campaign, an umbrella federal-employee drive that distributes funds to United Way and other groups. The unions were angered that the National Right to Work Legal Defense Fund, which they say is anti-union, had qualified to receive money collected in the 1982 combined campaign.

The unions were right. Charitable contributions should not go to a political advocacy group. But the Reagan administration wasn't to blame; the right-to-work group qualified because of a court order permitting participation by the National Organization for Women Legal Defense Fund. The order also opened the campaign to Planned Parenthood, the Sierra Club Legal Defense Fund, the Puerto Rican Legal Defense and Education Fund and others. The resulting brouhaha jeopardized truly charitable health and welfare groups who depend on United Way and the combined campaign.

In response, Reagan ordered that the combined campaign exclude agencies "that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying or litigation on behalf of parties other than themselves." Good for the president. Political advocacy groups should get their money elsewhere.

ATTACHMENT D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0928

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS,

v.

HON. DONALD J. DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT DEFENDANT.

AFFIDAVIT

Joseph A. Morris, being duly sworn, deposes and says:

1. I am the General Counsel of the United States Office of Personnel Management (OPM). In that position, I serve as the principal legal advisor to the Director of OPM on matters falling within his authority, including oversight of the Combined Federal Campaign (CFC). The statements made herein are based upon personal knowledge obtained in the course of performing my official duties.

2. On February 10, 1983, the President of the United States signed Executive Order No. 12404, titled "Charitable Fund-Raising," amending Executive Order No. 12353 of March 23, 1982. The President's directive was announced at a press conference held in the afternoon of February 10, 1983, in the Executive Conference Room of OPM's Headquarters in Washington, D.C. Because the Director of OPM was not able to attend the press conference, I was designated to speak for OPM in his stead.

3. At the press conference, I explained that henceforth the CFC would support only voluntary health and welfare programs that are aimed directly at the needs of the poor, the infirm, the hungry, and the truly needy. I stated that under the new Executive Order, the purposes of the CFC were now clear: "[t]hey are to lessen the burdens of government and of local communities in meeting needs of human health and welfare; to provide a convenient channel through which Federal public servants may contribute to these efforts; to minimize disruption of the workplace and costs to taxpayers; and to avoid the reality and appearance of the use of Federal resources in aid of fund-raising for political and advocacy groups." I recited the kinds of services enunciated in the Executive Order that would qualify an organization providing those services to participate in the CFC. In addition, I said that under the new Executive Order, any organization that seeks to influence elections or public policy determinations through political activity or advocacy, lobbying, or litigation on behalf of parties other than itself would be excluded from the CFC. Furthermore, I said that the new Executive Order provided the specificity which had been lacking in some CFC rules of the past. My remarks followed closely the statement quoted in the CFC press release issued by OPM on Februry 10, 1983 (attached as Exhibit 1 to this Affidavit).

4. Following my statement, representatives of certain organizations participating in the CFC were given the opportunity to make statements. I then entertained questions from the assembled members of the press, although I did so under the *caveat* that I would refuse to speculate on individual cases of eligibility.

5. During the questioning, I was asked, but refused to comment, about the eligibility of several legal defense funds. With respect to two other organizations, the NAACP Special Contribution Fund and the United Negro College Fund, while declining to speculate with any particularity, I did say that I would be surprised if they did not meet the new eligibility criteria. In addition, I was called upon to distinguish "legal aid societies" from "legal defense funds." I did so by stating that a legal aid society makes its services available to individuals solely on the basis of their financial need, without distinguishing on the basis of a particular cause, while legal defense funds are selective of clients on the basis of whether or not they have a cause, claim, or defense that the legal defense fund wishes to advance.

6. Neither at the press conference nor at any other time have I stated that a specific organization would be excluded from the CFC under the new CFC Executive Order and the regulations which will be issued to implement that Executive Order.

7. As of this date, regulations implementing Executive Order No. 12404 have not been published. When they are published, there will follow a thirty-day period for public comment. The comments may well result in changes to the proposed regulations. Until the regulations have been made effective in final form, and until OPM has had the opportunity to take action on the application of an organization in light of eligibility requirements contained in the regulations, it would be speculation to state whether or not a particular organization would be found eligible to participate in the CFC.

/s/ Joseph A. Morris
JOSEPH A. MORRIS

Sworn and subscribed before me this 12th day of April, 1983, in the City of Washington, District of Columbia.

/s/ Helen B. Welch
HELEN B. WELCH
Notary Public

My Commission Expires:
MARCH 31, 1987

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0928

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS,

v.

DONALD J. DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT DEFENDANT.

SUPPLEMENTAL AFFIDAVIT OF EMANUEL OWENS

EMANUEL OWENS, being duly sworn, deposes and says:

1. Attached hereto as Exhibit N is a true and accurate copy of a memorandum dated March 4, 1983, from Donald J. Devine received by my office.

2. Attached hereto as Exhibits O, P, and Q are true and accurate copies of letters from local CFCs received by my office relating to the 1981 Combined Federal Campaign.

3. During the course of my work as coordinator of CFC activities for plaintiff NAACP/LDF, I have had a number of conversations with local CFC officials in which they have expressed concern with problems they have had in 1981 and 1982 because of the late dates by which OPM has informed them of the organizations found to have national eligibility. Attached hereto as Exhibit R are true and accurate copies of letters from local CFCs relating to this problem.

4. In 1982 NAACP/LDF received responses from local CFCs to applications as late as October. Indeed, we have still not heard from a significant number of CFCs. Attached

hereto as Exhibit S is a true and accurate copy of a letter from OPM relating to some of our appeals.

/s/ Emanuel A. Owens
EMANUEL OWENS

APRIL 25, 1983

Sworn to and subscribed before me this 25th day of April, 1983.

/s/ Ivaline R. Passé
IVALINE R. PASSÉ
Notary Public

UNITED STATES OFFICE OF
PERSONNEL MANAGEMENT
Washington, D.C. 20415

March 4, 1983

CFC PARTICIPANTS AND ORGANIZATIONS THAT HAVE INQUIRED ABOUT CFC PARTICIPATION

On February 10, 1983, President Reagan signed Executive Order No. 12404 for the Combined Federal Campaign which amends Executive Order No. 12353. A copy of the new order and the OPM news release announcing it are attached.

Current CFC regulations will be changed to implement the order. This will involve publication of proposed changes in the *Federal Register*, a period of public comment, the evaluation and assimilation of the comments, and then publication of the final regulations. At that point, we will be in a position to receive, consider, and act upon applications from national voluntary organizations for participation in the fall 1983 Campaign.

We will send you the proposed and final changes to the regulations. With the latter will be a notification of the deadline for receipt of applications.

The regulation changes and application processing will be accomplished as quickly as possible this year so that fall 1983 Campaign planning can begin as early as possible. To help insure that this is done, you may wish to submit a complete application at this time, prepared in accordance with the current July 6, 1982, regulations. It would then be modified, after the final regulations are published, to comply with changes that may affect your particular organization.

Thank you in advance for your interest and cooperation.

/s/ DONALD J. DEVINE
Director

Exhibit N, Owens Aff. CA No. 83-0928

ALBUQUERQUE-SANTA FE FEDERAL
EXECUTIVE BOARD
2930 Yale, SE, Rm. 109A
Albuquerque, N.M. 87106
Telephone: (505) 766-2230
FTS 474-2230

August 4, 1981

Mr. Charles Stephen Ralston
First Assistant Counsel
NAACP Legal Defense and
Educational Fund, Inc.
10 Columbus Circle
New York, N.Y. 10019

Dear Mr. Ralston:

In reference to your memorandum to me of July 28, 1981, I regret to inform you that the Federal Coordinating Group will not reverse our earlier determination.

The OPM guidance suggested regarding a possible extension of 60 days to our local time table, but due to our irrevocable local printing schedule, it was impossible to reverse our decision. Since the adoption of the extension in question is discretionary, your speculative deduction is not valid. Your reference to the National Resources Defense Council Inc. vs. Donald J. Devine Stipulation of Dismissal is noted only as it relates to the plaintiff.

Upon a review of our files, we find your submission memorandum was indeed a duplicate and thus the signature was not original. It is the decision of the Federal Coordinating Group that your amended signature block sent me by memorandum dated July 28, 1981 does not override the earlier submission.

Your interest in participating in the Albuquerque CFC for 1982 is appreciated. Should OPM accept your organization as an NSA member for next year's campaign, we

would be happy to consider your application for the 1983 campaign in our area.

Sincerely,

/s/ CELESTINO PAPUYO

Chairman
Federal Coordinating Group

Ex. O, Owens Aff. CA. No. 83-0928

UNITED STATES POSTAL SERVICE
Lynchburg, Virginia 24506

September 8, 1981

NAACP Legal Defense and Educational Fund, Inc.
10 Columbus Circle
New York, New York 10019

Attention: Mr. Charles Stephen Ralston

Gentlemen:

The Lynchburg Combined Federal Campaign Committee met on June 17, 1981, and approved those agencies which had submitted application to participate as a National Service Agency. Your application was received after that date.

Members of the committee were then contacted when late applications were received and their decision was that further consideration should not be given. Therefore, I must regretfully advise you that your application has been denied.

Yours very truly,

/s/ R.F. RICHARDSON

Chairman
Lynchburg CFC Committee

Ex. P, Owens Aff. CA No. 83-0928

COMBINED FEDERAL CAMPAIGN OF
SAN DIEGO COUNTY
Suit M-101, 937 North Harbor Drive
San Diego, CA 92132 Tel.(714) 234-5415

15 July 1981

Mr. Charles Stephen Ralston
First Assistant Counsel
NAACP Legal Defense & Education Fund, Inc.
10 Columbus Circle
New York, New York 10019

Dear Mr. Ralston:

This acknowledges receipt of your 13 July 1981 letter which supplements your 18 June application to participate in our Fall '81 Combined Federal Campaign (CFC). Both will be placed before our CFC Committee on 29 July and we will advise you of the committee's action shortly after that date.

The following is for information:

—We understand that the Office of Personnel Management (OPM) has just mailed the guidance on CFC applications which you mentioned in the fourth paragraph of your letter. If this written guidance causes you to make any additional comment, we will be happy to include that comment in our submission to our committee on 29 July.

—You are correct in saying that the name of an agency does not count in the 25-word description used in contributors directories. If your application is approved by our CFC Committee, we will modify the description provided in your application only enough to make it conform to the style of the others in our current directory. I am enclosing a copy of that directory for your information. (Please note that we printed our directory early in order to reach the substantial part of our contributor force which is deployed to the Indian Ocean aboard ships of the U.S. Navy—people on whom we are heavily dependent for success). We are planning to issue a directory supplement and radio the distant ships if

our CFC committee approves any of the agency applications received late because of late OPM action.

Sincerely,

/s/ D.W. BROWN
Director

Copy to:
Mr. James J. O'Keefe, CFC Committee Chairman

Ex. Q, Owens Aff. CA No. 83-0928

ROANOKE AREA
FEDERAL EXECUTIVES ASSOCIATION
Poff Federal Building, 210 Franklin Road, S.W.
Roanoke, Virginia 24011

September 7, 1982

NAACP Legal Defense and
Educational Fund, Inc.
10 Columbus Circle, Suite 2030
New York, NY 10019

SUBJ: Roanoke Area Combined
Federal Campaign Applications

Over the past 30 days or so the Local Federal Coordinating Committee (LFCC) has received a large number of applications for inclusion in the local Combined Federal Campaign as National Service Agency participants. By and large, the applications were adequate, although there were wide variations in the quality and methods of establishing a "Direct and substantial presence in the local campaign community".

Obviously, much of the criteria is new to you as it is to us. This circumstance coupled with the rather tight deadlines has compounded our difficulty in attempting to arrive at a fair and equitable decision for all concerned. In some instances we have also been unable to respond individually to your inquiries.

In view of these circumstances our LFCC has voted to accept *all* applications, as submitted for inclusion in the local CFC for *1982*. PLEASE NOTE THAT THIS APPROVAL APPLIES ONLY TO THE CURRENT (1982) CAMPAIGN. Participation in the 1983 CFC will require submission of a new application for 1983. Hopefully, the ensuing year will allow ample time for all to become better acquainted with the methods for preparing and evaluating applications for CFC participation.

The local CFC will be conducted during September and October. Kick-off date is not yet firm but will probably be between September 22-30.

/s/ A.E. KESSLER

Chairman, Local Federal Coordinating Committee
Roanoke Area Combined Federal Campaign

Ex. R, Owens Aff. CA No. 83-0928

DEPARTMENT OF THE ARMY
HEADQUARTERS 5TH INFANTRY DIVISION,
MECHANIZED, AND FORT POLK
FORT POLK, LOUISIANA 71459

9 September 1982

Mr. Emanuel A. Owens, Jr.
Coordinator, CFC
NAACP Legal Defense & Eduational Fund, Inc.
10 Columbus Circle
New York, New York 10019

Dear Mr. Owens:

It is a pleasure to inform you that your agency has been approved for admission to the Fall 1982 Fort Polk Area Combined Federal Campaign, Fort Polk, Louisiana. The period of 22 October through 2 December has been set for the conduct of our campaign.

Because of the late receipt of guidance from the Office of Personnel Management, we have been "running a little behind" in formulating our plans; however, we are looking forward to another successful campaign this year.

Sincerely,

/s/ Patrick W. Clark
PATRICK W. CLARK
LTC, FA
Director of Personnel and
Community Activities

DEPARTMENT OF THE ARMY
HEADQUARTERS 7TH INFANTRY DIVISION
AND FORT ORD
FORT ORD, CALIFORNIA 93941

13 September 1982

NAACP Legal Defense and Education Fund
1975 Sutter St., Suite #1
San Francisco, CA 94115

Dear Sir:

We are pleased to inform you that your request for inclusion in the Monterey County Combined Federal Campaign has been reviewed and approved by our Federal Coordinating Committee.

We wish to indicate, though, that due to the fact that the list of OPM approved organizations reached us very late this year, we were able to make only a superficial assessment of local involvement of NSA affiliates. As a result, we adopted a liberal inclusion in the 1982 campaign. However, we plan a more thorough review in 1983, at which time we will require specific information on activities affecting our C.F.C. area.

The description of your services, as outlined in your application, will be used in the 1982 brochure, and upon completion of the campaign, we will contact you regarding contributions received for your agency.

In the meantime, should you have any questions, please do not hesitate to contact our Combined Federal Campaign Officer.

Sincerely,

/s/ Ray F. Cole
RAYMOND F. COLE
COL, FA
Executive Chairman

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

October 14, 1982

Mr. Emanuel A. Owens, Jr.
Coordinator, CFC
NAACP Legal Defense and Educational Fund, Inc.
10 Columbus Circle
N.Y., N.Y. 10019

Dear Mr. Owens:

This is in response to your letter of October 6, 1982, appealing the decisions of local Federal coordinating committees to deny your agency admission to their local Combined Federal Campaigns.

In CFC Memorandum No. 82-13, dated September 3, 1982, I issued guidance relating to (1) the timeliness of agency appeals from local CFC eligibility decisions, and (2) the information I would need from an agency in order to be able to decide on its appeal. Regarding (1), subsequent to September 13, 1982, it has been necessary for appeals to be submitted to my office within ten business days from the date the notification of rejection was issued. Regarding (2), all such appeals must include a copy of the letter of rejection and the specific and detailed information the agency has of its local eligibility in each case. Based upon your agency's letter of appeal of September 10, 1982, which I answered on September 16, 1982, I conclude that you have understood this guidance relating to the appeal process.

In your letter of appeal of October 6, 1982, however, you state that you seek review of all denials to local Combined Federal Campaigns. Toward that end you attach rejection letters from seventy-six local CFCs. In all but thirteen of these cases, however, your appeals have been submitted beyond the time provided for in the above referenced guidance. Accordingly, the only appeals I can now act upon are those from the following locations:

Lancaster, Pennsylvania
Hot Springs, Arkansas
Norton AFB, California

Ex. S. Owens Aff. CA No. 83-0928

Bath, New York
Rochester, New York
Ashtabula, Ohio
Longview, Texas
Clarksburg, West Virginia
Corvallis, Oregon
New Orleans, Louisiana
Zanesville, Ohio
Morristown, Tennessee
Dyess AFB, Texas

The letters of rejection from the locations in the right hand column above are undated. Accordingly, I am treating these as timely appeals.

Included with your letter of October 6, 1982 was information about your local eligibility in only five of the above locations. I have found that information to be sufficient to enable me to overturn the local decisions in those five locations. Accordingly, you are eligible to participate in the following local campaigns.

Hot Springs, Arkansas
Bath, New York
Rochester, New York
Longview, Texas
Dyess AFB, Texas

By copy of this letter I am officially advising the local Federal coordinating committees in those areas of my decision.

Sincerely,

/s/ Donald J. Devine
DONALD J. DEVINE
Director

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0928

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS,

v.

DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT.

ORDER

This matter is before the Court upon defendant's motion to dismiss this action on the ground that it is premature. Plaintiff's motion for a preliminary injunction is also before the Court. For the reasons which follow, both motions are denied.

This action concerns the eligibility of plaintiffs, various charitable organizations referring to themselves as "legal defense funds," to participate in the Combined Federal Campaign (CFC). The CFC is the only means by which charitable organizations are able to solicit contributions from federal employees at their work stations. Previously, legal defense funds had been denied participation in the CFC because of a regulation limiting eligibility to organizations providing "direct services." This rule was challenged by two legal defense funds (who are also plaintiffs in the instant case) on various grounds. Judge Gesell of this Court issued a very narrow ruling discarding the "direct services" requirement as it then existed on the ground that it lacked "the precision necessary to comport with constitutional requirements." *NAACP Legal Defense and Educational Fund, Inc.* v. *Campbell*, 504 F. Supp. 1365, 1368 (D.D.C. 1978).

Since then, on February 10, 1983, the President issued Executive Order No. 12404, which imposed a new "direct

services" requirement on the CFC and containing a greater amount of specificity than the previous rule, evidently in an effort to prevent it, too, from being declared void for vagueness. The instant suit is plaintiffs' challenge to that Executive Order.

Defendant has moved to dismiss the suit on the ground that since regulations putting the Executive Order into effect have not yet been promulgated (and therefore no decisions have been made regarding plaintiffs' eligibility to participate in the 1983 CFC), the cause is not ripe. Defendant argues that plaintiffs should be required to wait for the regulations to be promulgated through notice and comment procedures, allow their applications for participation in the CFC to be processed, and then resort to judicial action only if at such time they are denied participation. However, as plaintiffs note, defendant has publicly expressed the government's intention to exclude "any organization that seeks to influence . . . public policy determinations through . . . litigation on behalf of parties other than itself." OPM Press Release "President Orders Federal Drive to Focus on Charity for Truly Needy" (Feb. 10, 1983), at 1, Exh. A to McClure Affidavit. Accordingly, it might well be futile to require plaintiffs to go through the motions of exhausting administrative remedies. Therefore, the motion to dismiss shall be denied.

With respect to plaintiffs' motion for preliminary injunction, it would not be appropriate to grant such relief at this time. Plaintiffs seek that defendant be enjoined from denying them the ability to participate in the fall 1983 CFC. Yet at this early stage where no CFC applications have been processed (nor even received from some of the plaintiffs) there is no basis for determining whether plaintiffs would be eligible to participate in the CFC even under the uncontroverted requirements of the program. As such, plaintiffs have not demonstrated that they will sustain immediate and irreparable harm absent the issuance of an injunction, a prerequisite to such relief under the criteria established by the Court of Appeals in *Virginia Petroleum Jobbers Association* v. *F.P.C.*, 259 F.2d 921 (D.C. Cir. 1958). As a result, this motion also must be denied.

In light of the foregoing, it is, by the Court, this 5th day of May, 1983.

ORDERED, that defendant's motion to dismiss shall be and hereby is denied, and it is

FURTHER ORDERED, that plaintiffs' motion for a preliminary injunction shall be and hereby is denied, and it is

FURTHER ORDERED, that defendant's motion for an enlargement of time in which to respond to plaintiffs' motion for summary judgment shall be and hereby is granted, defendant's opposition to said motion to be filed within 10 days of the date of this Order, telephonic notice thereof to be given to the parties this date.

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 83-0928

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS,

v.

HONORABLE DONALD J. DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT.

DEFENDANT'S STATEMENT OF GENUINE ISSUES

Pursuant to Local Rule 1-9(h), the following is submitted by defendant in response to the Statement Of Material Facts As To Which Plaintiff Contends There Is No Material Issue. These responses employ the enumeration utilized by plaintiffs in their Statement.

1. On January 19, 1981, this Court issued a memorandum opinion and order ordering that pending or future application of plaintiffs NAACP Legal Defense and Educational Fund, Inc., and Puerto Rican Legal Defense and Education Fund, Inc., to participate in the Combined Federal Campaign (CFC), not be denied on the basis of the "direct services" requirement as it was then set forth in Section 5.21 of the *Manual of Fund-Raising Within the Federal Service for Voluntary Health and Welfare Agencies.* (504 F. Supp. 1365 (D.D.C. 1981).) Plaintiffs NAACP Legal Defense and Educational Fund, Inc., Puerto Rican Legal Defense and Education Fund, Inc.; Federally Employed Women Legal and Education Fund, Inc.; Indian Law Resource Center; and National Resources Defense Council, Inc., applied for and were admitted to the CFC conducted in the fall of 1981 and the fall of 1982. (Supplemental Affidavit of P. Kent Bailey.) Plaintiffs Lawyers' Committee for Civil Rights Under Law, and Sierra Club Legal Defense Fund, Inc. did not apply to participate in the CFC conducted in the fall of 1981. (Supplemental Affidavit of P. Kent Bailey.) These organizations did participate in the CFC conducted in the fall of 1982. (Supplemental Affidavit of P. Kent Bailey.)

2. On June 9, 1981, Defendant announced that he saw a "need for clearer direction and more precise standards" for the CFC, and that the provisions of the *Manual* were inadequate to meet these needs. (Affidavit of Charles Stephen Ralston, Ex. B.) In 1982, Defendant issued new CFC regulations which did not include the "direct services" eligibility criteria which had been included in the CFC *Manual.* (5 C.F.R. Part 950.)

3. On February 10, 1983, the President of the United States signed Executive Order 12404, "Charitable Fund-Raising," amending Executive Order 12353. The purpose of the Executive Order as stated, *inter alia,* was "to lessen the burdens of government and of local communities in meeting needs of human health and welfare." (48 *Fed. Reg,* 6685 (Feb. 15, 1983).) Executive Order 12404 provides that, "The objectives of the Combined Federal Campaign are to lessen the burdens of government and of local communities in meeting needs of human health and welfare; to provide a convenient channel through which Federal public servants may contribute to these efforts; to minimize or eliminate disruption of the Federal workplace and costs to Federal taxpayers that such fund-raising may entail; and to avoid the reality and appearance of the use of Federal resources in aid of fund-raising for political activity or advocacy of public policy, lobbying, or philanthropy of any kind that does not directly serve needs of human health and welfare." (*Id.*) Executive Order 12404 further provides that:

> "To meet these objectives, eligibility for participation in the Combined Federal Campaign shall be limited to voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families. Such direct health and Welfare services must be available to Federal employees in the local campaign solicitation area, unless they are rendered to needy persons overseas. Such services must directly benefit human beings, whether children, youth, adults, the aged, the ill and infirm, or the mentally or physically handicapped. Such services must

> consist of care, research or education in the fields of human health or social adjustment and rehabilitation; relief of victims of natural disasters and other emergencies; or assistance to those who are impoverished and therefore in need of food, shelter, clothing, education, and basic human welfare services. . . .
>
> Agencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves shall not be deemed charitable health and welfare agencies and shall not be eligible to participate in the Combined Federal Campaign."

(*Id.*)

4. Executive Order 12404 was announced at a press conference held by the United States Office of Personnel Management (OPM) on February 10, 1983. (Affidavit of Joseph A. Morris.) In the press release distributed at the press conference, and in the remarks of OPM's General Counsel at the press conference, it was explained that under the new Executive Order, any organization that seeks to influence elections or public policy determinations through political activity or advocacy, lobbying, or litigation on behalf of parties other than itself would be excluded from the CFC, and that a legal aid society which makes its services available to individuals solely on the basis of their financial need would be permitted to participate in the CFC, while legal defense funds which select their clients on the basis of whether or not they have a cause that the legal defense fund wishes to advance, would not be permitted to participate in the CFC. (*Id.*) At the press conference, it was not announced that any specifically named organization would be allowed to participate in the CFC, or that any specifically named organization would not be allowed to participate in the CFC. (*Id.*) The purposes of Executive Order 12404, as described at the press conference, and in the memorandum dated February 2, 1983, from Defendant to Craig L. Fuller, are to state as the bases for the CFC those objectives listed in the Executive Order, and to provide language precise enough to implement these objectives. (Id.; Affidavit of Charles Stephen Ralston, Ex. K.) The

memorandum from Defendant to Craig L. Fuller states that under existing CFC eligibility criteria, the NAACP Legal Defense Fund had been a CFC participant. (Affidavit of Charles Stephen Ralston, Ex. K, p. 4). The memorandum does not state that the new Executive Order will permit the exclusion of legal defense funds; rather, the memorandum quotes the language of the Executive Order which would exclude from CFC eligibility, "Agencies which seek to influence the outcomes of elections on the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves." (Affidavit of Charles Stephen Ralston, Ex. K, pp. 5-6.). The results sought to be achieved by the new Executive Order, are those stated in it. (48 Fed. Reg. 6685 (Feb. 15, 1983).)

5. The press release makes it clear that Executive Order 12404, "was motivated by the deep conviction of this Administration that private sector contributions to the essential safety net should be encouraged and supported, and that it is unfair and unjust to have the Federal Government using its resources to promote any political or advocacy group." (Affidavit of Joseph A. Morris, Ex. 1.) The participation of some organizations in the past had resulted in controversy and threatened boycotts of the campaign. (Affidavit of Phyllis McClure, Ex. A; Supplemental Affidavit of P. Kent Bailey.) These organizations were not limited to the National Right to Work Legal Defense Foundation, Inc., but included any non-health and welfare organization. (*Id.*) The harm to the CFC from the participation of these organizations was largely averted in the last Campaign by assurances from OPM that changes to the CFC's eligibility standards would be forthcoming, and by the extraordinary efforts of CFC volunteers. (Supplemental Affidavit of P. Kent Bailey; Affidavit of Phyllis McClure, Ex. A.).

6. On September 8, 1982, the Executive Committee, Board of Governors, United Way of America, approved and adopted a resolution in which United Way of America reaffirmed its support for limiting eligibility for the CFC to charitable agencies providing direct, human-care services in the fields of health and welfare, and urged the President

of the United States to clarify and amend Executive Order 12353 to reflect such limitations. (Affidavit of Charles Stephen Ralston, Ex. H.)

7. Preliminary information from the larger of the 550 CFCs on the results of their fall 1982 campaigns indicate that total contributions increased approximately 6.6 percent. (Supplemental Affidavit of P. Kent Bailey.) This information also indicates that the rate of participation on the part of Federal employees and members of the Armed Forces (*i.e.*, the percentage of personnel making contributions) decreased by approximately 1.1 percent. (*Id.*) Information available for the 25 largest CFCs indicates that the participation rate declined in 13 of these, increased in 7, and did not change in one (*Id.*).

8. The continued inclusion in the CFC of organizations which seek to influence the determination of public policy through political advocacy or litigation on behalf of parties other than themselves will cause some present CFC contributors to stop contributing to any organizations through the CFC. (Affidavit of P. Kent Bailey; Supplemental Affidavit of P. Kent Bailey; Affidavit of Phyllis McClure, Ex. A.).

9. Executive Order 12404 itself, the documents which reflect its genesis, and the announcements to the press regarding the Executive Order all make it clear that the precision provided in the Order responds to this Court's decision that prior CFC eligibility criteria had been unduly vague, and this Court's admonishment that, "It behooves the government officials responsible for the program to reexamine the basic premises on which the program was established so that more acceptable standards can be developed which will assure continuation of the government's significant and useful support for worthy charitable solicitation." (504 F. Supp. at 1369; 48 *Fed. Reg.* 6685 (Feb. 15, 1983); Affidavit of Charles Stephen Ralston, Ex. B, D, E, and K; Affidavit of Joseph A. Morris; Statement of Donald J. Devine, Attachment C to Defendant's Motion to Dismiss.).

10. The line which would be drawn under Executive Order 12404 between legal aid societies and legal defense

funds is that the former makes its services available to individuals solely on the basis of their financial need, without distinguishing the basis of a particular cause, while the latter are selective of clients on the basis of whether or not they have a cause, claim, or defense that they wish to advance. (Affidavit of Joseph A. Morris.) This distinction has not previously been set forth in CFC guidelines or regulations, and was found by Judge Gesell in his memorandum opinion and order dated January 19, 1981, to have been set forth only in rejection letters and, having been used in that context alone, to have comprised only an "analogy" to explain which type of organization would meet the "direct services" criteria formerly set forth in Section 5.21 of the CFC *Manual*. (504 F. Supp. at 1367.)

11. At the press conference, OPM's General Counsel stated that he would be surprised if the NAACP Special Contribution Fund did not meet the new eligibility criteria for the CFC, but he did not announce that the NAACP Special Contribution Fund would be admitted to the CFC. (Affidavit of Joseph A. Morris.) In its memorandum opinion and order dated January 19, 1981, the Court found the NAACP Special Contribution Fund to be "the most closely analogous organization (to plaintiffs) permitted to join the CFC." (504 F. Supp. at 1367-68, fn. 3.) The Court found as follows with respect to an assertion in that case that the "direct services" criteria in Section 5.21 of the CFC Manual could be measured based on mathematical analysis of an organization's budget:

> First, it is clear from the evidence that this analysis constitutes nothing more than a *post hoc* rationalization by defendant constructed especially for this litigation. Second, and more important, it is unclear how defendant proposes to screen the budget for each organization to be certain that comparable figures are derived. Third, the Supreme Court just last Term struck down a similar percentage based restraint in *Village of Schaumburg* v. *Citizens for a Better Environment.*

504 F. Supp. at 1360.

12. Executive Order 12404 distinguishes between "voluntary, charitable, health and welfare agencies that pro-

vide welfare services to individuals or their families" and "(a)gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves." (48 *Fed. Reg.* 6685 (Feb. 15, 1983).) In its memorandum opinion and order dated January 19, 1981, the Court did not determine whether or not plaintiffs NAACP Legal Defense and Educational Fund, Inc., and Puerto Rican Legal Defense and Education Fund, Inc., met the "direct services" requirement then set forth in Section 5.21 of the CFC *Manual*. What the Court determined—"and all that it ... determined"—is that the "direct services" requirement as it was then employed did "not have the precision necessary to comport with constitutional requirements." 504 F. Supp. at 1368. Indeed, because of the vagueness which Judge Gesell found the *Manual's* direct services requirement to have suffered from, he could not have applied that requirement to those applications. Whether plaintiffs will meet the participation requirements of Executive Order 12404 and the implementing regulations must, of course, await promulgation of final regulations and assessment of each of the plaintiffs' applications in light of the Executive Order and the implementing regulations.

13. In its Order denying plaintiff's motion for a preliminary injunction, this Court has already ruled that plaintiffs have not demonstrated that they will sustain the immediate and irreparable harm they allege will occur if they are not at this time found eligible to participate in the fall 1983 CFC. In the Court's memorandum opinion and order dated January 19, 1981, plaintiffs' request for a disbursement from the 1981 CFC receipts to compensate them for their wrongful exclusion from the 1980 CFC was denied because plaintiffs had never before participated in the CFC and therefore could present no factual basis on which a reasonable sum could be determined; and, in any event, such an award did not appear to be appropriate or equitable under the facts of the case, given that there was a genuine dispute as to the eligibility of the plaintiffs for the CFC and that there already were vested interests by other groups in the receipts. (504 F. Supp. at 1369.)

14. The *status quo* is that no organizations have been accepted to participate in the fall 1983 CFC, since no applications have been ruled upon. (Supplemental Affidavit of P. Kent Bailey.) Requiring plaintiffs' applications to be decided will dramatically alter that *status quo*.

15. Defendant has been warned by CFC contributors, CFC workers, federal employee unions, and members of Congress, that continued inclusion in the CFC of non-health and welfare organizations will result in diminished support for the Campaign. (Affidavit of P. Kent Bailey; Supplemental Affidavit of P. Kent Bailey; affidavit of Phyllis McClure, Ex. A.) The participation rate in many campaigns has already declined. (Supplemental Affidavit of P. Kent Bailey.) Boycotts of the fall 1982 CFC occurred at some localities. (Supplemental Affidavit of P. Kent Bailey, Attachment A.) As evidenced by many of the submissions protesting the inclusion of non-health and welfare agencies in the CFC, the threat of these boycotts spreading is very real. (*Id.*) The President and Director Devine have reasonably concluded that some response to these concerns and threats is necessary in order to preserve the purposes of the CFC of meeting human health and welfare needs. *See* Executive Order 12404; Attachment C to Defendant's Motion to Dismiss (Devine testimony).

Respectfully submitted,

STANLEY S. HARRIS
United States Attorney

ROYCE C. LAMBERTH
Assistant United States Attorney

JOHN D. BATES
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0928

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS,

v.

HONORABLE DONALD J. DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT.

SUPPLEMENTAL AFFIDAVIT

P. Kent Bailey, being duly sworn, deposes and says:

1. I am the program analyst providing staff support to the Assistant to the Deputy Director for Regional Operations, United States Office of Personnel Management (OPM). The Office of the Assistant to the Deputy Director is the is the office with primary responsibility for support to the Director of OPM in the administration of the Combined Federal Campaign (CFC). The statements made herein are based upon personal knowledge obtained in the course of performing the official duties assigned to me.

2. Preliminary information from the larger of the 550 CFCs on the results of the domestic CFC conducted in the fall of 1982 indicate that total contributions increased approximately 6.6 percent. It also showed that the rate of participation on the part of Federal employees and members of the Armed Forces decreased by approximately 1.1 percent. Information on 21 of the 25 largest CFCs shows that the participation rate declined in 13, increased in seven, and did not change in one.

3. After the fall 1982 CFC OPM received numerous letters from CFC Chairpersons, Federal agency heads in the field, Federal employees and members of the Armed Forces, voluntary charitable organizations, union officials

and members of Congress protesting the inclusion in the CFC of what they considered "advocacy organizations" and asking that eligibility for participation in the CFC be limited to organizations that provide direct health and welfare services. Many of the CFC Chairpersons and Federal agency heads said that their fall 1982 campaigns succeeded only because of the extensive extra efforts made by them, other local CFC leaders and agency heads, and campaign workers. Many also warned that, based on feedback from Federal employees and members of the Armed Forces, contributions and participation in the fall 1983 and future CFCs is likely to diminish unless "advocacy organizations" are excluded from the CFC. Attachment A is a sample of the letters referred to above.

4. All seven plaintiffs in this action applied for and participated in the fall 1982 CFC. All but two, the Lawyers' Committee for Civil Rights Under Law and the Sierra Club Legal Defense Fund, did so in the fall 1981 CFC.

5. No decisions have been made of applicants for participation in the fall 1983 CFC as of this date.

/s/ P. Kent Bailey
P. KENT BAILEY

Sworn to and subscribed before me this 18th day of May, 1983, in the City of Washington, District of Columbia.

/s/ Helen B. Welch
HELEN B. WELCH
Notary Public

My Commission expires: 3-31-87

Attachment A

DEPARTMENT OF THE ARMY
HQ, US ARMY AVIATION RESEARCH AND
DEVELOPMENT COMMAND
4300 GOODFELLOW BOULEVARD,
ST. LOUIS, MO 63120

November 22, 1982

Mr. Donald J. Devine
Director
Office of Personnel Management
1900 E Street NW
Washington, DC 20415

Dear Mr. Devine:

The US Army Aviation Research and Development Command (AVRADCOM) remains an enthusiastic supporter and consistent contributor to the Combined Federal Campaign (CFC). Since the Command's establishment in 1977, our CFC monetary goals have been met each year and many AVRADCOM employees provide volunteer services to various CFC agencies in addition to their financial contributions.

Although this year's campaign was successful in reaching the goal established, the percentage of employee participation slipped considerably. While participation rates have shown a downward trend over time, I am concerned that this year's significant drop may be the direct result of the noncharitable organizations added to the 1982 CFC.

This year's campaign included a large number of private, nonprofit agencies whose activities involve advocacy and activism rather than the traditional charitable objectives. For this reason, many employees chose not to contribute. The fact that personnel can designate specific agencies to receive their donations offers little consolation to potential contributors who strongly oppose the purposes of these noncharitable agencies.

Other executives, both within and outside the Federal sector, share the concerns this letter conveys. A policy review of the decision to permit other than charitable organizations to benefit from CFC operations should be seriously

considered. Without a reexamination of today's policy, the potential exists to seriously damage future CFC efforts.

Please let me know if I can be of any assistance in working toward regaining the positive attitude needed to encourage greater participation in future CFC efforts.

Sincerely,

/s/ Story C. Stevens
STORY C. STEVENS
Major General, USA
Commanding

Cy Furn:
Mr. Clarence Squellati, Chairman
1982 East-West Gateway CFC
Mr. Sidney Ford, Chairman, Federal Executive Board,
St. Louis, MO
General Donald R. Keith, Commander, DARCOM
Mr. Gerald Hinch, Regional Director,
Office of Personnel Management

SOUTH FLORIDA AFL-CIO

January 13, 1983

Received January 18, 1983
Office of the Director

Donald J. Devine, Director
Office of Personnel Management
900 E St
Washington, DC 20415

With discussions underway regarding problems encountered in the 1982 combined federal campaign, I would like to express strong disagreement with OPM's decision to include controversial non health and welfare services as eligible agencies to participate in local combined federal campaigns. The inclusion of those agencies brought about considerable fragmentation in the Dade County community which resulted in losses of some $172,000 for legitimate health and welfare services.

The impact of such losses are devastating, especially during a period of economic recession and federal funding cut backs for these services. Such actions destroy local initiatives to increase charitable contributions for needed health and welfare services. I urge you to reconsider this decision and restrict the CFC effort to health and welfare services only.

E T STEPHENSON
President of South Florida
AFL-CIO

UNITED STATES POSTAL SERVICE

November 22, 1982

Received November 26, 1982
Office of the Director

Mr. Donald J. Devine
Director, United States Office of
Personnel Management
Washington, D.C. 20415

Dear Mr. Devine:

For many years past I have worked with local Combined Federal Campaigns in Alabama, Arkansas, Louisiana, Mississippi, and Tennessee. I have served as Chairman in Alabama and Arkansas and now Mississippi and while this year has been interesting, both I and members of our Local Combined Federal Coordinating Committee were infected with a feeling of frustration and a lessened sense of satisfaction. We felt that far too many groups were allowed to participate in the Combined Federal Campaign.

It is my request that you influence more in the selection of participating groups and attempt to reduce or eliminate the number of social and political agencies.

As the list grows longer, confidence in the integrity of the Combined Federal Campaign wans.

Sincerely,

/s/ W. G. Smith

W. G. SMITH
Sectional Center Manager/
Postmaster
Jackson, Mississippi 39205-9998

DEFENSE MAPPING AGENCY
AEROSPACE CENTER
ST LOUIS AIR FORCE STATION, MISSOURI 63118

19 January 1983

Received Jan. 24, 1983
Office of the Director

Dr. Donald J. Devine
Director
Office of Personnel Management
Washington, D.C. 20415

Dear Dr. Devine:

As the Director of the Defense Mapping Agency Aerospace Center in St. Louis, Missouri, I have been greatly involved in both the 1981 and 1982 Combined Federal Campaigns. During this past two, I have observed an erosion of trust and credibility concerning the goals and purposes of the CFC.

The introduction of political advocacy groups to the list of deserving health and welfare agencies, seriously undermines the years of dedicated support that our employees have always openly displayed. This past year this Center for the first time did not make its established goal. This goal was 12 percent higher than 1981 and only 95 percent of it was achieved. Key workers, torch-lighters, loaned executives, and project officers related essentially the same story. Although such reasons as, "only a 4 percent federal pay raise last October," or "economic conditions" were offered as negative affects, the singularly distinctive reason that came out most of all was our employees dislike for the inclusion of politically oriented groups that support social issues of abortion, busing, and right to work. Although they are recognized as serious and controversial social problems, we see no reason for their inclusion in a health and welfare campaign.

As much as we talked and explained the use of designating contributions to the agency of your choice, there is an inherent belief that the monies in the undesignated pool are divided up so that all listed agencies receive some share of the pie. Therefore, it makes no difference if an employee

designates his own money to a certain cause, there will be political groups on the list of eligible agencies that will still benefit from his overall support of the CFC (what they don't get by specific designation they will get from the undesignated pool).

Local pressure groups picket outside this Center and distribute flyers listing those CFC agencies that support busing, abortion, etc., and ask the federal employees not to contribute to the CFC.

For many years, this Center has voluntarily supported the CFC in an enthusiastic and dedicated manner. However, I have grave concerns on the present direction of the CFC and its list of qualifying recipients. The growing resentment against the change in character of the CFC will lead to less and less support of the CFC each year and eventually to its collapse as a worthwhile nationwide program in support of the truly needy of this nation.

Sincerely,

/s/ J. W. Small

J. W. SMALL
Colonel, USAF
Director

GREATER CINCINNATI
FEDERAL EXECUTIVE BOARD
9526 FEDERAL OFFICE BUILDING
550 MAIN STREET
CINCINNATI, OHIO 45202

January 12, 1983

Received Jan. 14, 1983
Office of the Director

Honorable Donald J. Devine
Director
U.S. Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

Dear Dr. Devine:

The purpose of this letter is to call to your attention our growing concern over the future of the Combined Federal Campaign of the Cincinnati Metropolitan Area.

For years the Internal Revenue Service and the U.S. Postal Service Bulk Mail Center have led the way in our local CFC. This year, neither reached their CFC goals. In both cases, failure to reach goal was due primarily to various union activities in response to OPM's decision to allow the Right to Work Legal Defense Fund to participate in CFC. It is our understanding that full-fledged union boycotts could occur throughout our entire CFC this fall if such organizations as Right to Work are allowed to continue to participate in CFC.

We in Cincinnati are still quite proud of our CFC achievements in the Fall 1982 Campaign. Even with the problems mentioned above, we were able to reach our overall dollar goal. Making goal, however, was due primarily to the inordinate amount of official time and effort put into the Campaign by everyone concerned. The Federal Government can no longer afford to do this!

We in Cincinnati are already expeiencing difficulty getting Federal executives to volunteer for leadership roles for the Fall 1983 CFC. No one really wants to chair the overall Campaign. It has evolved into a thankless, time-consuming and frustrating endeavor. In addition, as Federal budgets and personnel continue to be reduced, local Federal executives will be unable to allow their remaining resources to be dissipated in non-mission activities like CFC.

What we really need is a return to the basics for which CFC was created. Then, and only then, can there be unity of purpose: To raise voluntary contributions for the truly needy at a minimum of cost to the Federal sector. In this regard, we strongly recommend that the CFC Executive Order and Regulations be revised to restrict participation in CFC to traditional health and/or welfare agencies only.

Sincerely,

/s/ San Juan C. Romero
SAN JUAN C. ROMERO
Chairman

cc: Mr. Carey, OPM Chicago

WESTERN UNION TELEGRAM

January 11, 1983—PM 7:29

Received January 12, 1983
Office of the Director

Donald J. Devine, Director
OPM RPT DLY MGM, DLR
900 E ST, NW
Washington, DC 20415

The highly emotional reaction to OPM's forcible inclusion of non health and welfare agencies in CFC this year nearly caused a disaster in both United Way and CFC campaigns in our community. If this situation is not corrected I foresee a serious rupture which may take a decade or more to heal. I urge your immediate action on this crucial issue.

ROBERT REEDS,
Executive Secy Treasurer
Greater Kansas City Missouri Labor Council AFL-CIO
6301 Rockhill Rd.
Kansas City, MO 64131

UNITED STATES DEPARTMENT OF AGRICULTURE
LAKEWOOD, CO 80225

January 31, 1983

Received February 3, 1983
Office of the Director

Dr. Donald J. Devine
Director, U.S. Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Dear Dr. Devine:

With the 1983 Combined Federal Campaign now closed within our organization, we need to share some concerns with you.

Several entities, which are viewed by a growing number of our employees as inappropriate, have been added to the list of participating agencies. This belief has developed because the organizations are seen as self serving special interest advocacy groups rather than charitable, community oriented public help organizations.

You need to be aware that a significant number of our employees refused to join in the Combined Federal Campaign this year. This was a direct reaction to the types of organizations that were permitted to be included under present policy.

You are encouraged to establish eligibility policy that includes only health and welfare groups and excludes advocacy groups.

Your help can have a direct result on the success of future campaigns.

Sincerely,

/s/ Craig W. Rupp
CRAIG W. RUPP
Regional Forester

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE ACCOUNTING AND FINANCE CENTER
DENVER, CO 80279

January 27, 1983

Received February 1, 1983
Office of the Director

SUBJECT: Combined Federal Campaign

TO: Dr. Donald J. Devine
Director, U.S. Office of Personnel Management

1. The 1982 Denver Metropolitan Area Combined Federal Campaign was a definite success. However, we did receive complaints because of the inclusion of other than traditional health and welfare organizations.

2. We feel that the strong support from the American Federation of Government Employees (AFGE) was a key factor to our success. There is the promise that the AFGE will boycott the 1983 campaign if the National Right to Work Legal Defense and Education Foundation, Inc., is included again. We also feel that the same should apply to any advocacy group, the CFC should not provide a forum for political groups.

3. As a final item, there is still the impression that designated contributions do not go to the designated agency. This year's publicity might emphasize this point further. These suggestions are offered to further improve an already excellent program.

/s/ D. Lynn Rans
D. LYNN RANS,
Brigadier General, USAF
Commander

WESTERN UNION TELEGRAM

January 11, 1983—PM 4:31

Received January 12, 1983
Office of the Director

Donald J. Devine, Director, DLR
Office of Personnel Management RPT DLY MGM
900 E St. NW
Washington, DC 20415

The United Way of San Diego County is deeply concerned that the recent inclusion of non health and welfare organizations into the Combined Federal Campaign has significantly impacted the United Way share of our local CFC. While our LFCC has not officially declared our campaign results the projections for the United Way share of the 1982 drive is $582,000 less than last year a loss of 25 percent. At least ½ of this amount is attributable to the inclusion of these agencies. This will significantly impact our local United Way's ability to fund our 84 member agencies at a level commensurate with their needs. We strongly urge the White House and the Office of Personnel Management to re-examine non health and welfare agencies in light of the erosion of the quality of human care services and programs.

R. E. MORRIS, President
United Way of San Diego County
PO Box 17720
San Diego, CA 92117

WESTERN UNION MAILGRAM

January 10, 1983

Received January 18, 1983
Office of the Director

Donald J. Devine, Director
Office of Personnel Mgmt
900 E St. NW
Washington, DC 20004

Bernalillo County AFL-CIO urges change in CFC rules to eliminate non-health and welfare organizatons. Union members boycotted 1982 campaign over this issue. We fear further harm to voluntary efforts in 1983 campaign if changes not made.

LORRAINE MILLER, President
AFL-CIO Central Labor Counsel
Board Member Albuquerque United Way

WESTERN UNION MAILGRAM

January 11, 1983

Received January 12, 1983
Office of the Director

Donald J. Devine, Director
Office of Personnel Management
900 E St. Northwest
Washington, DC 20415

The labor community in the Seattle King County Area does not and will not support the inclusion of non-health and welfare agencies and organizations in the Combined Federal Campaign (CFC). Boycotts will again flourish in upcoming CFC and United Way Campaigns if advocacy and other politically oriented organizations are included at the further expense of local health and welfare agencies and organizations. We urge you to only include health and welfare organizations in the CFC.

JACK LAWSON, Secretary
Communications Workers of America
Member, PNB,
King County and Washington State
United Way Drive

DEPARTMENT OF THE ARMY
HQ, US Army Troop Support & Aviation
Materiel Readiness Command
4300 Goodfellow Boulevard, St. Louis, MO 63120
January 18, 1983

Received January 21, 1983

Directorate for Personnel, Training
and Force Development

Mr. Donald J. Devine
Director, Office of Personnel Management
1900 E. Street N.W.
Washington, D.C. 20415

Dear Mr. Devine:

The US Army Troop Support and Aviation Materiel Readiness Command (TSARCOM) remains an enthusiastic supporter and consistent contributor to the Combined Federal Campaign (CFC). Since the Command's establishment in 1977, our CFC monetary goals have been met each year and many TSARCOM employees provide volunteer services to various CFC agencies in addition to their financial contributions.

Although last year's campaign was successful in reaching the goal established, the percentage of employee participation slipped considerably. While participation rates have shown a downward trend over time, my concern centers on the idea that last year's significant drop in partcipation directly results from the noncharitable organizations added to the 1982 CFC.

Last year's campaign include a large number of private, nonprofit agencies whose activities involve advocacy and activism rather than the traditional charitable objectives. For this reason, many employees chose not to contribute. The fact that personnel can designate specific agencies to receive their donations offers little consolation to potential contributors who strongly oppose the purposes of these noncharitable agencies.

Other executives, both within and outside the Federal sector, share the concerns this letter conveys. A policy review of the decision to permit other than charitable organizations to benefit from CFC operations should be seriously considered. Without a reexamination of today's policy, the potential exists to seriously damage future CFC efforts.

Please let me know of any assistance required to work toward regaining the positive attitude needed to encourage greater participation in future CFC efforts.

Sincerely,

/s/ _____
EMIL L. KONOPNICKI
Major General, U.S. Army
Commander

Cy Furn:
Mr. Clarence Squellati, Chairman 1982 East-West Gateway CFC
Mr. Sidney Ford, Chairman, Federal Executive Board, St. Louis, MO
Mr. Gerald Hinch, Regional Director, Office of Personnel Management

WESTERN UNION MAILGRAM
Local 290 Boilermakers Union
PO Box 488
Bremerton WA 98310
January 11, 1983

Received January 12, 1983

David Divine Director of Office of Personnel
900 E St Northwest
Washington DC 20415

Our 1983 CFC experienced a 20 percent drop in contributions as compared to 1982. This was largely because inclusion of advocacy groups provided a considerable obstacle to support by labor community. You should realize that our local health and social welfare agencies were seriously harmed and will continue to suffer if the CFS persists in mixing advocacys groups with our truly charitable agencies.

W K Holt Boilermakers Union Local 290

DAN J. GOULD BRANCH NO. 343
National Association of Letter Carriers
Affiliated with AFL-CIO and
St. Louis and Missouri State Labor Councils
January 17, 1983

Received January 19, 1983

Mr. Donald J. Devine, Director
Office of Personnel Management
Washington, D.C. 20415

Dear Mr. Devine:

I am writing to express my concern for the continued effectiveness of the Combined Federal Campaign. This past year, due to actions initiated by yourself, the inclusion of the Right-To-Work Legal Defense Fund had put the Combined Federal Campaign in an almost uncompromising position. Due to the common sense approach and the ability of the people in the St. Louis area to work together, this particular obstacle was overcome.

I am writing because I do not see the continued effectiveness, of the C.F.C. if organizations and agencies such as the Right-To-Work Legal Defense Fund are allowed to be recipients of contributions that should be earmarked for charitable organizations. The Right-To-Work Legal Defense Fund is not charitable, and organizations such as this have no business being included as a recipient of the C.F.C. funds.

I certainly do not want to see the demise of the C.F.C. which has done so much to help people in need, but if the C.F.C. is not handled properly and does not concern itself with the intent and the purpose for which it was founded, the alternate result will be eventual destruction of the C.F.C. because people will no longer contribute.

I certainly hope you will take the appropriate actions.

Sincerely,

/s/ _____

JOHN HAAKE,
President
Branch 343, N.A.L.C.

WESTERN UNION TELEGRAM
January 10, 1983

Received January 11, 1983

Mr. Donald J Devine,
Director Office of Personnel Management
900 E Northwest
Washington, DC 10415

The National Association of Letter Carriers in the Seattle King County area does not and will not support the inclusion of non-health and welfare agencies and organizations in the combined federal campaign (CFC).

Boycotts will again flourish in upcoming CFC and United Way Campaign if advocacy and other politically oriented organizations are included at the further expense of local health and welfare agencies and organizations. We urge you to modify the regulations accordingly.

William R. Guiberson, President, National Association of Letter Carriers, Branch 79 (107 Cherry St Seattle WA 98104)
107 Cherry St
Seattle WA 98104

PORTLAND FEDERAL EXECUTIVE BOARD
1776 Federal Building
1220 S.W. Third Avenue
Portland, Oregon 97204
(503) 221-3010

January 18, 1983

Dr. Donald J. Devine, Jr.
Director, Office of Personnel
Management
1900 E Street, N.W.
Washington, D.C. 20415

Subject: Combined Federal Campaign

Dear Dr. Devine:

As Chairman of the CFC for the Portland, Oregon area, I am writing you regarding the issues that need addressing to alleviate the concerns that created major problems in conducting the 1982-83 CFC. These concerns were brought about by the ruling in OPM Letter 950-1.

The loss of local control of the CFC caused major concern to the Portland Federal Executive Board and the Federal employees in this area. The overriding of local decisions not to allow political action and special interest groups of this type to be recipients of voluntary contributions by the OPM has in effect made it impossible for local contributors to feel they are a part of resolving the needs of local people.

Many contributors do not like the requirement of having to designate the agency to receive their contributions. The concern is that many very worthy agencies will be left without resources for charitable fund raising and fund distribution to recipient agencies. The feeling is, with United Way the PCFO, the designation would be unnecessary if only health and welfare agencies were to be the recipients of contributions.

The eligibility of political action and special interest groups of this type created much opposition to this year's CFC. This related to loss of local control. The agencies identified as causing the greatest concern are:

1. The National Right to Life Educational Foundation

2. Vietnam Veterans of America Foundation
3. National Council of Negro Women, Inc.
4. The NOW Legal Defense and Education Fund
5. Conservative Legal Defense and Education Fund
6. National Right to Work Legal Defense Foundation, Inc.
7. Planned Parenthood Association
8. Sierra Club Legal Defense Fund, Inc.
9. Natural Resources Defense Council
10. World Wildlife Fund—U.S.

I will quote you a sentence from one letter that I received:

"Unless constructive changes are made by the Office of Personnel Management, the chances of organized labor amassing in boycott for next year's campaign is a logical conclusion."

I believe this pretty well sums up the attitude of most Federal employees in this area, even though most are not members of organized labor.

My suggestion to you is that you need to initiate major changes in current OPM rules or next year the CFC will be hard pressed to solicit voluntary funds.

The results of the CFC in this area supports that Federal employees are concerned with the well being of those people that are in need of health and welfare assistance. They feel that it is of utmost importance that OPM revise or eliminate 950-1 so as to allow this program to operate as a local program.

This year, there was approximately 11,550 hours used by Federal employees in soliciting and managing the Portland area CFC. This is approximately 25% greater use of Federal resources than in the past and was primarily due to the necessity of explaining the OPM rules and trying to convince the contributors they should continue to support the CFC.

It is the desire of the Portland FEB that you initiate action to have major revisions made to the OPM rules contained in FPM Letter 950-1, particularly the rules relating to local eligibility decisions.

Sincerely yours,

/s/ _____

M. ELDON GREEN,
Chairman
Combined Federal Campaign—
Portland, Oregon

FEDERAL EXECUTIVE BOARD
OF GREATER ST. LOUIS, MISSOURI
Staff Office, Room 2025
1520 Market Street, St. Louis, Missouri 63103-2682

January 12, 1983

Received January 18, 1983
Office of the Director

Dr. Donald Devine
Director
Office of Personnel Management
1900 "E" Street, N.W.
Washington, D.C. 20415

Dear Dr. Devine:

The 1982 East-West Gateway CFC raised $1,326,000 which exceeded the 1981 total by $39,000 even though participation declined by approximately four percent.

From the onset it became apparent that this year's drive would be very difficult, especially after 1981's problems with the National Association of Neighborhood Schools (NANS). This year NANS again picketed the Federal Buildings; however, after a meeting with their chairman and the CFC chairman they agreed to stop picketing and passing out the handbills. They are still adamant and will no doubt be active next year. The threat of boycott by unions was real. Only by hard work were we able to gain their outward support, but many of the rank and file members still reacted negatively.

The steering away from the traditional health and welfare groups could spell the demise of the CFC as we have grown to know it. The loaned executives and key persons must at times face groups of employees who are staunch union members and they must overcome a negative attitude caused by CFC inclusion of advocacy groups.

To be ultimately successful in a general fund drive, all agencies must be noncontroversial. When advocacy groups or groups that stir up negative feelings because of religious

or union affiliation are present, we place an undue stumbling block in the path of many potential givers.

There is a growing concern on the part of Federal officials that if the CFC does not remove many of the controversial organizations, dire results will occur. Many people are looking for a chink in the CFC armor, and it appears that by including advocacy groups we play into their hands; and we provide the "I'll give at home" individual the excuse for not participating. We strongly urge the OPM exert maximum efforts to exclude "all" advocacy groups from the 1983 program.

Sincerely,

/s/ _____
SIDNEY M. FORD
Chairman

ENCLOSURE

WESTERN UNION MAILGRAM
January 11, 1983

Received January 12, 1983
Office of the Director

Donald J Devine
Director Office of Personnel Management
900 E St Northwest
Washington DC 20415

The labor community in the Seattle King County area does not support the inclusion of non health and welfare agencies and organizations in the Combined Federal Campaign (CFC). Boycotts will again flourish in upcoming CFC and United Way Campaigns if advocacy and other politically oriented organizations are included at the further expense of local health and welfare agencies and organizations. As General Campaign Chairman I urge you to modify the regulations accordingly.

WESTERN UNION MAILGRAM
January 11, 1983

Received January 12, 1983
Office of the Director

Donald J. Devine
Director Office of Personnel Management
900 E St Northwest
Washington DC 20415

The inclusion of advocacy and politically oriented organizations in the Combined Federal Campaign (CFC) has created a road block in charitable contributions from union members in the Seattle King County area, unless these groups are removed from the CFC list, health and welfare organizations will continue to feel the severe impact of the labor community's boycott of these campaigns. As president of United Way of King County I urge you to only include health and welfare organizations in the Combined Federal Campaign.

John D Durbin
President Cummins Northwest Diesel, Inc
PO Box 9811
Renton WA 98057

FEDERAL EXECUTIVE BOARD
Buffalo
January 25, 1983

Mr. Joseph A. Morris
General Counsel
Office of Personnel Management
Washington, D.C. 20415

Dear Mr. Morris:

The Buffalo Federal Executive Board would like to register its concern over the admittance of advocacy groups into the Combined Federal Campaign.

In the Buffalo area most of our government work forces are unionized; and most of these groups are expected to take strong opposition to the inclusion of certain advocacy groups. Whereas we were able to deal effectively with this situation in 1982, we have heard that it will likely become a rather prominent issue in 1983.

Although we are hopeful that the campaign will receive total support from our government unions, lack of such support could be devastating to the results of our campaign.

Sincerely,

/s/ _____
MICHAEL R. DALY, MAJOR, USAF
Chairman
Federal Executive Board

UNITED STATES POST OFFICE
Atlanta Sectional Center
Atlanta, GA 30304-9998
January 18, 1983

Received January 20, 1983
Office of the Director

Dr. Donald J. Devine
Director, OPM
1900 "E" Street
Washington, DC 20415

Dear Dr. Devine:

My CFC Coordinator, who has served in that capacity since 1972, tells me the 1983 Combined Federal Campaign was the most difficult campaign of the past ten years.

The campaign just completed required more time and more energy than any campaign to date. Why? Because the CFC, under the auspices of OPM, has become a financial jackpot for any quasi-legitimate organization that (a) applies, (b) establishes a local office, and/or (c) sets up a toll-free telephone number.

We have gotten so far away from the "human services and needs" concept of the CFC that generous long term contributors have decided that they will send a monetary gift to the organization or charity of their choice rather than taking a chance on some "Right-to-Work-Committee" getting a slice of the CFC pie.

You are aware of the on-again, off-again boycott by the National Association of Letter Carriers (NALC) at the outset of the 1983 Campaign. Even though that boycott was officially lifted by the local NALC president, you must be aware, also, of the confusion and uncertainty among the membership of the NALC and the negative impact these factors had on the contributor and the amount of his contribution.

For the first time in 10 years the Metropolitan Atlanta Postal Family failed to reach its CFC goal. We attribute this shortfall in contributions and contributors to the "open

door" policy of OPM. And unless OPM reverses its posture with regard to CFC, we will experience a steady deterioration in contributions.

Dr. Devine, postal and federal employees are both compassionate and generous to those less fortunate than ourselves, but be assured that neither the group nor the adjectives can be taken for granted.

Sincerely,

/s/ _____

RICHARD I. CARLETON
Sectional Center Manager/
Postmaster
Atlanta, GA 30304-9998

COMMANDING OFFICER
Naval Air Station
Dallas, Texas 75211
January 16, 1983

Doctor Donald Devine
Director
Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Dear Doctor Devine,

The purpose of this letter is to provide you with a reflection of opinion at the Naval Air Station, Dallas, Texas, concerning the scope and nature of Combined Federal Campaign disbursements. The letter is submitted at the request of the Dallas-Fort Worth Federal Executive Board, and does not necessarily represent an official position of either the Department of the Navy or the Department of Defense. Rather, it is an expression of personal preference on the part of military personnel and civilian employees who contribute to the Combined Federal Campaign.

The basic question presented to Combined Federal Campaign contributors was: "Should Combined Federal Campaign disbursements include health and welfare agencies only, or should they also include certified advocacy organizations such as the Sierra Club, various right-to-work groups, and equal rights groups?" Over-whelmingly, the personnel of the Naval Air Station, Dallas, favor restricting Combined Federal Campaign disbursements to health and welfare organizations only. This opinion encompasses members of a local lodge of the American Federation of Government Employees.

Sincerely,

/s/ _____

C. G. ANDRES
Captain, U.S. Navy

Copy to:
DFW Federal Executive Board

DENVER FEDERAL EXECUTIVE BOARD
Building 41,
Denver Federal Center
Denver, Colorado 80225
Telephone: (303) 234-6704
January 12, 1983

Dr. Donald J. Devine
Director
U.S. Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Dear Dr. Devine:

The 1982 Denver Metropolitan Area Combined Federal Campaign was a success. However, we had many complaints from agencies, unions, employee groups and individuals because of the inclusion of other than traditional health and welfare organizations in the Campaign. The main reason for our success in 1982 can be attributed to the super efforts by our loaned executives, agency chairmen, agency heads, union leaders and others involved.

The strong support we had from the American Federation of Government Employees (AFGE) was also very important to our success. We do have a promise of a boycott of the 1983 Campaign if the National Right to Work Legal Defense and Education Foundation, Inc., is included again. Two smaller unions did boycott the 1982 Campaign because of their inclusion. If AFGE carries through on their promise, and I have every reason to believe they will, all Federal government employee unions will follow suit and the 1983 Campaign will fail miserably.

I understand that the Office of Personnel Management is currently working on new CFC regulations. If Campaigns are to succeed in 1983, we desperately need to assure CFC funds are limited to traditional health and welfare groups and that advocacy groups are excluded. I would like to strongly encourage OPM to establish such eligibility parameters in the new regulations.

I would also like to encourage early publication of the regulations. Because of the lead time necessary for the

printing and other preparations for an October Campaign, regulations are necessary no later than May 1, 1983.

Sincerely,

/s/ _____
NORMAN ALVERSON
Chairman

DEPARTMENT OF HEALTH & HUMAN SERVICES
Office of the Regional Director
Region VIII
Federal Office Building
1961 Stout Street
Denver CO 80294
January 20, 1983

Dr. Donald J. Devine
Director, U.S. Office of
Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

Dear Dr. Devine:

I am writing to you in regard to how the Combined Federal Campaign is operated. I personally, along with many other federal employees, find it disatisfying that the Combined Federal Campaign has veared from helping traditional health and welfare groups and now includes many advocacy groups which have little or nothing to do with helping the needy. In addition, I do not feel that the mere fact an organization has a local presence, is cause to automatically be included in the campaign. Many groups have local presence, but traditionally do nothing in the field of health and welfare.

While we as agency heads are mandated to participate in the Combined Federal Campaign, promotion of the campaign would be easier if the situation mentioned above was considered.

As budgets dwindle, thereby causing reductions in personnel, it is vital that those employees who are left, take up the slack in contributions that would be lost by the truly needy and welfare groups.

Your consideration and attendion to this matter would be most appreciated.

Sincerely,

/s/ _____
PATRICK C. ALLISON
Regional Director

FAMILY TREE, INC.
7307 Grandview Avenue
Arvada, Colorado 80002
303 422-2133
February 2, 1983

Dr. Donald J. Devine, Director
Office of Personnel Management
1900 E. Street Northwest
Washington, D.C. 20145

Dear Dr. Devine,

As the Executive Director for Family Tree, I am deeply concerned that our ability to raise the needed funds to provide these services may be impaired by recent developments in the charitable campaign for federal employees. This concern is especially distressing at this time of high unemployment and ever increasing need for services. Here in Denver, there was over $130,000 less dollars raised for United Way agencies through the C.F.C. that could have been allocated for our critical human care services.

The recent decision to admit single purpose advocacy groups to the Combined Federal Campaign, the only charitable fund drive allowed on federal property, has endangered what has been a successful fund raising effort for our organization in the past. The admission of these organizations was *highly controversial* and has caused confusion and disenchantment with the campaign.

This disenchantment has already seriously impaired the ability of local principal combined fundraising organizations to raise funds to support direct services. A continuation will cause irreperable erosion of our fund raising efforts in the future. If continued, local estimates range from a 10% to 50% reduction in funding from federal employees in 1983. Many hard-hit communities are already cutting back in their allocations, while demand for the services by the needy is rising. Action must be taken to rectify this situation.

Therefore, we urge President Reagan to modify Executive Order 12353 by limiting eligibility in the Combined Federal Campaign to organizations that devote a substan-

tial portion of their expenditures to services in the health and welfare field.

President Kennedy launched the Combined Federal Campaign in 1961 to encourage federal employees to pledge money in support of voluntary health and welfare charities. The campaign was designed to complement the direct effort of the government itself to meet *basic human needs*. For 20 years the campaign operated successfully under this premise. Returning to President Kennedy's original intent for the Combined Federal Campaign is the best course of action. This return will achieve two important results. It will (1) encourage support of programs that are critical to the national interest because they provide for basic human needs; and (2) make ineligible for participation in the Combined Federal Campaign controversial single purpose advocacy groups. The present eligibility of these groups is resulting not only in loss of support from federal employees but also from those working Americans who provide most of the support to our agencies.

Sincerely,

/s/ _____

JUDY HUDSON-TRUJILLO
Executive Director

JHT/mb
cc: Rolland Hoffman

OFFICE OF THE DIRECTOR
JEWISH FAMILY AND CHILDREN'S
SERVICE OF COLORADO
Allied Jewish Federation Bldg.
300 So. Dahlia St. Suite 101
Denver, Colorado 80222-8198
February 3, 1983

Dr. Donald J. Devine, Director
Office of Personnel Management
1900 E. Street Northwest
Washington, D.C. 20145

Dear Dr. Devine:

As the Executive Director for Jewish Family and Children's Service of Colorado, I am deeply concerned that our ability to raise the needed funds to provide social services may be impaired by recent developments in the charitable campaign for federal employees. This concern is especially distressing at this time of high unemployment and ever increasing need for services. Here in Denver, more than $130,000 fewer dollars were raised for United Way agencies through the combined Federal Campaign which could have been allocated for our critical human care services.

The recent decision to admit single purpose advocacy groups to the Combined Federal Campaign, the only charitable fund drive allowed on federal property, has endangered what has been a successful fund raising effort for our organization in the past. The admission of these organizations was highly controversial and has caused confusion and disenchantment with the campaign.

This disenchantment has already seriously impaired the ability of local principal combined fund raising organizations to raise funds to support direct services. A continuation will cause irreparable erosion of our fund raising efforts in the future. If continued, local estimates range from a 10 percent to 50 percent reduction in funding from federal employees in 1983. *Many hard-hit communities have already been cut back in their allocations while demand by*

the needy for services is rising. Action must be taken to rectify this situation.

Therefore, we urge President Reagan to modify Executive Order 12353 by limiting eligibility in the Combined Federal Campaign to organizations that devote a substantial portion of their expenditures to services in the health and welfare field.

The Combined Federal Campaign was designed to complement the direct effort of the government itself to meet *basic human needs.* For 20 years the campaign operated successfully under this premise. Returning to the Campaign will achieve two important results; (1) Encourage support of programs that are critical to the national interest because they provide for basic human needs; (2) Make ineligible for participation in the Combined Federal Campaign controversial single purpose advocacy groups. The present eligibility of single purpose advocacy groups is resulting not only in loss of support from federal employees, but also from those working Americans who provide most of the support to our agencies.

Sincerely,

/s/ _____

JERRY GROSSFELD, ACSW
Executive Director

SERVICIOS DE LA RAZA
4055 Tejon Street Denver, Colorado 80211
February 9, 1983

Dr. Donald J. Devine
Director
Office of Personnel Management
1900 E. Street Northwest
Washington, D.C. 20145

Dear Dr. Devine,

Servicios de La Raza, a mental health and social services agency located in Denver, Colorado, experienced a threefold increase in the demand for its basic emergency social services during the past year. Despite the increase we were unable to procure sufficient funds from our local Mile High United Way to increase services to needy clients due in large measure to a shortfall in Mile High's fund drive for 1982. This in turn was largely due to a decrease in contributions from the Combined Federal Campaign.

Some Federal employees boycotted or lessened their contributions through the Combined Federal Campaign because of the inclusion of controversial single purpose agencies as recipients of this fund. Even groups outside the federal system lessened their support to United Way despite the fact that United Way has no control over which organizations are admitted to the Combined Federal Campaign. The impact of this was felt locally by Servicios de La Raza.

At a time when local and national United Way Agencies, Corporations and Foundations are re-prioritizing their giving to concentrate resources on critical human needs, it is very discouraging to have the Combined Federal Campaign work against this effort. We therefore urge you and President Reagan to not admit into the Combined Federal Campaign controversial non-direct service groups which negatively affect the giving of federal and *non-federal* employees. Secondly, in keeping with increasing needs and national trends, we urge you to place more emphasis on supporting those programs that provide basic human services in the health and welfare field.

Sincerely,

/s/ _____
ERNEST J. MARTINEZ
Executive Director

COLORADO HEARING AND SPEECH CENTER
4280 Hale Parkway
Denver, Colorado 80220
February 1, 1983

Dr. Donald J. Devine, Director
Office of Personnel Management
1900 E. Street Northwest
Washington, D.C. 20145

Dr. Devine:

As President of the Board of Directors for the Colorado Hearing and Speech Center, I am deeply concerned that our ability to raise the needed funds to provide these services may be impaired by recent developments in the charitable campaign for federal employees. This concern is especially distressing at this time of high unemployment and ever increasing need for services. Here in Denver there were over $130,000 less dollars raised for United Way agencies through the C.F.C. that could have been allocated for our critical human care services.

The recent decision to admit single purpose advocacy groups to the Combined Federal Campaign, the only charitable fund drive allowed on federal property, has endangered what has been a successful fund raising effort for our organization in the past. The admission of these organizations was *highly controversial* and has caused confusion and disenchantment with the campaign.

This disenchantment has already seriously impaired the ability of local principal combined fundraising organizations to raise funds to support direct services. A continuation will cause irreparable erosion of our fund raising efforts in the future. If continued, local estimates range from at 10% to 50% reduction in funding from federal employees in 1983. Many hard-hit communities are already cutting back in their allocations which demand for the services by the needy is rising. Action must be taken to rectify this situation.

Therefore, we urge President Reagan to modify Executive Order 12353 by limiting eligibility in the Combined Federal Campaign to organizations that devote a substan-

tial portion of their expenditures to services in the health and welfare field. President Kennedy launched the Combined Federal Campaign in 1961 to encourage federal employees to pledge money in support of voluntary health and welfare charities. The campaign was designed to complement the direct effort of the government itself to meet *basic human needs.* For 20 years the campaign operated successfully under this premise. Returning to President Kennedy's original intent for the Combined Federal Campaign is the best course of action. This return will achieve two important results. It will (1) encourage support of programs that are critical to the national interest because they provide for basic human needs; and (2) make ineligible for participation in the Combined Federal Campaign controversial single purpose advocacy groups. The present eligibility of these groups is resulting not only in loss of support from federal employees but also from those working Americans who provide most of the support to our agencies.

Sincerely,

/s/ _____

JERRY NORTHERN, PH.D.
BOARD PRESIDENT

DEPARTMENT OF HEALTH & HUMAN SERVICES
Region IV
101 Marietta Tower
Atlanta GA 30323
February 2, 1983

Donald J. Devine, Ph.D.
Director
Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

Dear Dr. Devine:

Last Fall, through my involvement on the Atlanta Federal Executive Board, I served on the admissions committee for the Metro Atlanta Combined Federal Campaign. During the process of reviewing requests for admission and conducting a public hearing, I was appalled that groups and organizations whose purpose was in direct conflict with basic American principles and policies could qualify as bona fide recipients, simply because they had a local address and a local or toll-free phone number.

While we encouraged our employees to designate the specific recipient(s) of their contributions, personally I resented the time and effort expended in raising funds for advocacy groups rather than service providers.

I strongly endorse the position that we prohibit advocacy groups from applying for funds raised by the Combined Federal Campaign. Rather, I would like to see the criteria revised that would restrict eligible applicants to direct providers of health and social services.

I am pleased to see your interest in reforming the major charitable fund-raising effort of the Federal Government. My best wishes and support in carrying out further reforms in the system.

Sincerely yours,

/s/ _____

GEORGE H. RUDY
Regional Director

Little Rock, Arkansas
February 8, 1983

Dr. Donald Devine, Director
U.S. Office of Personnel Management
1900 E Street, N.W.
Washington, DC 20415

Dear Dr. Devine:

The 1982 Combined Federal Campaign in Pulaski County, Arkansas, raised $319,423—a 9.14 percent increase over the previous year. If viewed in terms of dollars raised, this was a very successful campaign. However, if viewed in terms of organization, execution, and future potential, the campaign cannot be defined as either successful or promising.

Major problems were encountered on the local level during this past year's campaign. As Chairman of the 1982 Pulaski County Combined Federal Campaign, I view these problems as stemming from an insensitivity at the national level to local level needs and philosophy. In defense of this statement, and in the hope that future campaigns will not suffer from these same problems, the following comments and suggestions are offered.

(1) Inability of the national organization to make and stick with campaign schedules created delays at the local level which were costly and detrimental to the campaign. More than 90 percent of the gross dollar increase this year came from Little Rock Air Force Base personnel. This increase is attributed to increased military pay in the opinion of the keyworkers at the base. The campaign at the base, however, was seriously jeopardized by repeated delays of three weeks in getting the go ahead to print the campaign materials. As a result, in order to meet the deadline dictated by internal operation requirements, the campaign materials were printed in a rush and a premium price was paid to ensure timely delivery.

After given the go ahead to print and disseminate the campaign materials, even greater frustration resulted from the continued receipt from OPM of notifications of agency

admissions by appeal. These overulings of local decisions on agency admissions did not result in participation by these agencies since the campaign materials had been distributed and the solicitation was well underway.

DEPARTMENT OF THE ARMY
US Army Communications Command St Louis
4300 Goodfellow Boulevard, St, Louis, Missouri 63120
February 9, 1983

Dr. Donald J. Devine, Director
Office of Personnel Management
Washington, DC 20415

Dear Mr. Devine:

1. During the last Combined Federal Campaign, in the St. Louis area a great reluctance by individuals to participate was evident.

2. This reluctance is the direct result of incorporating advocacy and politically oriented groups. It is felt that health and welfare agencies should be the recipients. An informal personal survey, while not statistically valid, supports this position.

3. A further complication is a belief that whether or not a person designates a special activity to receive all or part of a contribution is futile because the ratio for each group has been predetermined before a campaign is kicked off.

4. I personally will no longer contribute to CFC if advocacy groups remain as recipients.

/s/ _____
STEVE E. NELSON
Deputy

Combined Federal Campaign, 915 Olive Street, Box 14507,
ATTN: Clarence P. Squellati, St. Louis, MO 63178

COMBINED FEDERAL CAMPAIGN
OF
CERRO GORDO COUNTY, IOWA
P.O. Box 1465
MASON CITY, IOWA 50401
November 30, 1982

Mr. Kent Bailey
Office of Personnel Management
Room 5532
1900 "E" N.W.
Washington, DC 20415

Dear Kent:

Enclosed is the note we discussed over the phone. This comment is only one of several like it which we have heard for several weeks. It is hard to determine how much we lost locally in contributions because of this group's admittance, even though no local monies went to them.

However, we as a committee were concerned about several groups admitted at the national level. Some of them seem to be strictly "cause" groups and have little or no connection with charitable acts or services to the needy. Fortunately for our campaign, a number of them did not qualify for local participation.

I suppose a lot of us in this area feel the original purpose of the United Way and CFC has somehow gone by the wayside.

The contributors here have shown their reactions to these things, plus the general economic picture, by giving about 25 percent less than last year. A few more years like this one and we may not be able to muster a CFC campaign here.

I just hope that someone back there will start listening to the signals being sent from different parts of the nation.

Thanks for your help in the past, Kent, it has been invaluable.

Sincerely yours,

/s/ _____
DICK WILSON
Chairman, CFC
Mason City, Iowa

ENCLOSURE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0928

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS,

v.

HONORABLE DONALD J. DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT.

AFFIDAVIT

I, William L. Robinson, depose and say as follows:

1. I am Executive Director and Chief Executive Officer of the Lawyers' Committee for Civil Rights Under Law. As such, I have responsibility for overseeing the day to day activities of the organization. These activities include responsibility for conducting the Committee's fundraising efforts which includes application to the Combined Federal Campaign.

2. The Lawyers' Committee for Civil Rights Under Law filed its application for inclusion in the 1983 Combined Federal Campaign on May 9, 1983.

Further deponent sayeth not.

/s/ William L. Robinson
WILLIAM L. ROBINSON

Sworn and subscribed before me this 25 day of May, 1983.

/s/ Valerie Prather
VALERIE PRATHER
Notary Public

My Commission expires on: March 31, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0928

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS

v.

DONALD J. DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT.

AFFIDAVIT OF SHARON MILES

SHARON MILES, affirms and says:

1. I am presently employed by the Sierra Club Legal Defense Fund, Inc. as the Office Manager of its Washington, D.C. office.

2. On May 20, 1983, I filed an Application of Sierra Club Legal Defense Fund for Participation in the Fall 1983 Combined Federal Campaign with the U.S. Office of Personnel Management. The application was filed by hand, and a copy of a statement acknowledging receipt of that application is attached to this affidavit.

/s/ Sharon Miles
SHARON MILES

Affirmed before me this 25 day of May, 1983.

/s/ Kurt Berlin
KURT BERLIN
Notary Public

My commission expires January 31, 1984

This acknowledges receipt of an application from the Sierra Club Legal Defense Fund for participation in the fall 1983 Combined Federal Campaign.

/s/ D. Emma
D. EMMA

May 20, 1983

AFFIDAVIT

IN THE MATTER OF APPLICATION TO THE COMBINED FEDERAL CAMPAIGN 1983–1984 BY THE NATIONAL RESOURCES DEFENSE COUNCIL, INC. (NRDC)

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ANNE F. SWEAZEY, being duly sworn, deposes and says:

I am Anne F. Sweazey, and my title is Development Director for Natural Resources Defense Council. As such, I am responsible for NRDC's application for participation in the 1983-1984 Combined Federal Campaign.

On May 26, 1983, I prepared NRDC's application for participation in the 1983-1984 Combined Federal Campaign, a copy of which is attached.

This application was sent to our attorney to be hand delivered to the Office of Personnel Management by Friday, May 27, 1983. It has been so delivered.

/s/ Anne Sweazey
ANNE F. SWEAZEY
Development Director
Natural Resources Defense
Council, Inc.

Sworn to before me this 26th day of May, 1983.

/s/ Andrea Elder
ANDREA ELDER
Notary Public

NRDC APPLICATION FOR COMBINED FEDERAL CAMPAIGN 1983-1984

Since NRDC was accepted for the 1981-1982 and 1982-1983 campaigns, and since there has been no substantial or significant change in any of the relevant categories, we are not submitting information under Sections (f)(1), (2), (3), (4), and (8).

(5) The Natural Resources Defense Council, Inc. (NRDC), is a nonprofit membership organization dedicated to improving the quality of the human environment. Environmental pollution poses a severe threat to human health: whether the source is dangerous particulates in the air, toxic substances in drinking water, or careless disposal of hazardous wastes, the results are accelerated impairment of human health, manifested in such ways as aggravation of respiratory and cardiovascular diseases, neurological problems, and learning disabilities. Often the persons most seriously affected are those least able to defend themselves: children, the elderly, and the poor.

NRDC seeks to combat environmental pollution and the ravages it causes through a broad program of scientific research, public education, and participation in the development of public policy on environmental and natural resource matters. Among the areas in which NRDC is currently active are air and water pollution, toxic substances control, energy policy, urban transportation, coastal zone and public lands management, and environmental impact assessment.

NRDC is making this application under the following subparagraphs of Section 950.101 (a) (3):

(v) ***Health research***

NRDC's scientists and resource specialists study the causes and health effects of the several different sources of environmental pollution. NRDC is currently studying the levels, types, and toxicity of pesticide residues on produce in California. We commissioned and distributed a study on acid rain and hazardous air pollutants which concluded that

11-21% of current lung cancer deaths could have been prevented by better hazardous pollutant controls.

(vii) ***Delivery of legal services to the poor and indigent, and defense of human and civil rights secured by law***

One of NRDC's goals is the defense through the legal system of the legally established constitutional and statutory right of every citizen to a safe and healthy environment. NRDC's legal actions have measurably improved the health and welfare of the citizens of the United States. For example, the landmark *NRDC* v. *Train* Consent Decree of 1976 compelled the Environmental Protection Agency (EPA) to establish the first comprehensive program regulating toxic pollutant discharges into the nation's waterways; and in 1979, we won settlement of the largest air pollution case in history, forcing the Tennessee Valley Authority to cut its emissions of sulphur oxides by a million tons per year, or 8% of the national total. The scientific research into the health effects of toxic substances provided by NRDC's scientific staff supplements the organization's defense of human and civil rights secured by environmental law. NRDC's legal actions also serve those who are disproportionately harmed by pollution, namely the poor, the elderly, and children.

(xiii) ***Information and counselling with respect to the obtaining of health and legal services***

NRDC is committed to increasing public awareness of the dangers of pollution, opportunities for public participation in decisionmaking processes affecting environmental quality, and options available for dealing with the various forms of pollution. Through our "Toxics Waterwatch" program, we trained hundreds of citizens in the South, the Midwest, and the Northwest how to monitor industrial permits controlling toxic discharges into the nation's waterways. NRDC has published handbooks and manuals on toxics regulations and permit procedures, coastal zone management, synthetic fuels development and other technical environmental subjects, distributing them to local community groups all over the country and using them to supplement our work with these groups. NRDC is currently

producing a comprehensive booklet describing the far-reaching effects of acid rain and various options for its control. We are also publishing a citizens' manual on groundwater pollution which encourages participation in decisions affecting drinking water.

(xiv) ***Lessening the burdens of government with respect to the provisions of the foregoing services***

The Clean Water Act of 1970 provides for active citizen participation in EPA's wastewater discharge permit program. EPA passed on to NRDC responsibility for educating the public in this often complicated process and making citizens aware that their participation was expected as an integral part of the plan. NRDC established temporary regional headquarters in Atlanta and Chicago and conducted workshops to educate citizens in their role in the permitting process. Currently, NRDC is conducting a pilot energy conservation project in the Pacific Northwest in cooperation with the governments of several states, which will then use the findings of the study to establish priorities and develop new energy policies.

Section 950.101(a)(2)

NRDC is not an "action" organization within the meaning of 26 CFR 1.501(c)(3)-1(c)(3) and is eligible to receive tax deductible contributions under 26 U.S.C. 170.

Section 950.403

(a) NRDC is a nonprofit, tax-exempt, charitable organization, supported by voluntary contributions from the general public and providing direct and substantial health and welfare and other appropriate national voluntary services through its national organization. All of NRDC's services are consistent with the policies of the United States Government.

(b) NRDC has a high degree of integrity and responsibility in the conduct of its affairs. We received an award from the U.S. Attorney General in 1979 "in recognition and appreciation for meritorious services which have materially contributed to the attainment of the highest standards of law enforcement and justice in the United States."

Funds contributed to NRDC by Federal personnel are effectively used for the announced purposes of NRDC.

(c)(1) NRDC is organized on a national scale with a national Board of Directors that represents its constituent parts; Board members are from the Northeast, the Midwest, the South, and the West, and include representatives of labor, law, journalism, science, business, and education. The Board exercises close supervision over the operations and fund-raising activities of the entire organization.

(c)(2) NRDC has earned good will and acceptability throughout the United States; its members are from all 50 states, and last year we were accepted by more than 100 local CFC campaigns. Some examples of cities where NRDC has a large constituency and where there are large numbers of Federal personnel are New York, NY; Boston, MA; Washington, DC; and Tucson, AZ.

(c)(3)(;) NRDC's activities affect citizens in every state by improving the quality of the air they breathe, the water they drink, the food they eat, and the land they use. Our Toxics Waterwatch Project alone involved participants from 17 states in three separate geographical regions. NRDC is currently promoting environmental quality and public health through several projects in different states, among them: studies of pesticide hazards in California; energy conservation in the Pacific Northwest; urban transportation in New York; protection of Alaskan coastal resources, from which several communities of native Alaskans derive their means of existence; acid rain control in the Midwest; and many others.

(ii) NRDC has contributing members in every state.

(iii) NRDC has 46,000 contributing members, including members in every one of the 50 states.

(iv) In addition to its many and varied local programs, several of NRDC's campaigns are national in scope. Our Campaign to Save the EPA, which was undertaken to ensure that the EPA maintains its ability to protect the nation's air and water, drew its support from around the entire nation. Our Coastal Project works to protect the coastal resources of Alaska as well as of the Western and Eastern seaboards. Our Clean Air and Clean Water Proj-

ects are national programs which draw their support from members in every state. For examples of public campaigns which substantially affect local areas, see Section 950.405(a)(6).

(d) NRDC is seeking support for current operations only.

Section 950.405

(a)(1) NRDC is a voluntary agency promoting public health through improvement and enhancement of environmental quality (See Section 950.101).

(a)(2) NRDC is voluntary and broadly supported by the public, meaning:

(i) that it is organized as a not-for-profit corporation under the laws of New York State;

(ii) that it is classified as tax-exempt under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended; and

(iii) that it has received more than 50% of its revenues from sources other than the Federal Government.

(a)(3) NRDC is directed by an active Board of Directors, all of whom serve without compensation. NRDC adopts and employs the *Standards of Accounting and Financial Reporting for Voluntary Health and Welfare Organizations;* prepares and makes available to the general public an annual financial report prepared in accordance with the *Standards of Accounting and Financial Reporting for Voluntary Health and Welfare Organizations* and is certified by an independent certified public accountant (See Appendix B); and provides for an annual external audit by an independent certified public accountant.

(a)(4) NRDC's fund-raising and administrative expense is not in excess of 25% of total support and revenue.

(a)(5) NRDC ensures that its publicity and promotional activities are based upon its actual program and operations, are truthful and nondeceptive, and include all material facts.

(a)(6) In addition to its nationwide programs, NRDC substantially benefits a large number of Federal employees at the local level all over the country. For example:

Urban Problems

—NRDC has played a major role in reducing levels of dangerous air pollutants in New York City's air. We were directly responsible for the establishment of regulations substantially reducing the amounts of lead in gasoline, which led to a sharp decrease in the incidence of lead-poisoning in city children. NRDC continues to work closely with the Mayor's office and a Transportation Coalition of business and civic groups to plan for safer, clean subways; efficient traffic patterns in automobile and bus lanes; and energy conservation measures.

Pesticide Contamination

—NRDC is conducting the nation's first independent study to examine the potential contamination of the food supply by pesticides. Increasing quantities of pesticide residues have been detected on food in California in recent years, and concern over the effects of these toxic residues has grown as well. NRDC will undertake a "market basket survey" of fruits and vegetables consumed in the five San Francisco Bay Area counties. The data will be analyzed by NRDC's scientific staff to assess the level of contamination and the associated health risks. NRDC will also evaluate California's current pesticide regulations, which we believe are inadequate to protect the public. The results of the study will be widely distributed to increase public awareness of the risks associated with involuntary pesticide consumption and to be used as a basis for recommending stricter controls on pesticide use.

Energy

—NRDC worked with Pacific Gas and Electric, California's largest utility, to establish a zero-interest loan program for all home weatherization;

—NRDC worked with the Bonneville Power Administration, the Pacific Northwest's largest utility, to make increased financial incentives to all potential investors in conservation and renewable energy programs.

—NRDC is working to initiate joint California/ Northwest proceedings on improving energy efficiency in appliances and buildings.

Air

—NRDC organized a joint United States/Canada workshop on acid rain in Toronto, and subsequently organized the Acid Rain Task Force to provide information on acid rain.

—NRDC is examining a number of emerging technologies for controlling sulfur dioxide emissions, the leading cause of acid rain. NRDC will use this information to develop proposals which would reduce acid rain and decrease the costs of acid rain control while protecting the jobs of miners who extract high-sulfur coal.

Coastal Resources

—NRDC produced a handbook on mitigating the effects of losses due to coastal storms and used it in working with communities along the East and Gulf Coasts. The handbook gave examples of positive action to avoid coastal hazards and to reduce floodplain losses by working with state and local officials.

—NRDC played an important role in the passage of the Pinelands Plan, a program to protect the fragile Pine Barrens in New Jersey. Citizens, industry, business and interested parties all had opportunities to participate in this plan.

—NRDC recently succeeded in obtaining an injunction against offshore oil and gas leasing in an ecologically sensitive area of the Outer Continental Shelf along the Alaska coast. NRDC believes that the fragile coastal area could not withstand the impacts of oil and gas leasing, exploration and development. The area in question is one of the most biologically productive in the world, and disruption of this habitat would have jeopardized the livelihood of several communities of native Alaskans who depend on the area's productivity for their subsistence.

NRDC ensures that its services are accessible to Federal employees in the local areas. It does this by issuing press releases to local newspapers, by consulting with other environmental organizations, and by putting notices about NRDC's services in publications of those organizations. NRDC is in the process of establishing a toll-free telephone number so that Federal employees and others all over the country can learn at no charge how they can benefit from NRDC's work.

(b) *Fund-Raising Practice.* NRDC's publicity and promotional activities assure protection against unauthorized use of its contributors lists; permit no payment of commissions, kickbacks, finders fees, percentages, bonuses, or overrides for fundraising; and permit no general telephone solicitation of the public.

(c) *Reports*

(1) *Annual Report*

NRDC prepares an annual report to the general public that includes a full description of its activities and accomplishments and the names of chief administrative personnel (Enclosed).

(2) *Combined Reports*

NRDC is not organized on an affiliate basis and therefore prepares only one financial report.

(3) *Source of Funds and Costs Report*

(Enclosed)

(6) NRDC is governed by a Board of Directors who play an active role in the management of NRDC. Board members attend six Board meetings per year and serve on Finance, Development, Nominating and Executive Committees. The Board of Directors manages, directs and controls the activities, affairs, and funds of NRDC. Specific responsibilities include development of significant internal policies, approval of organizational budget and legal actions, and investment and management of assets. Following is a list of current Board members:

Dr. Dean E. Abrahamson Humphrey Institute 967 Social Science Building University of Minnesota Minneapolis, MN 55455	Professor, Humphrey Institute of Public Affairs
Mrs. Adele Auchincloss 1111 Park Avenue New York, NY 10028	Industrial designer; Conservationist
Richard I. Beattie, Esq. Simpson Thacher & Bartlett One Battery Park Plaza New York, NY 10004	Partner, Simpson Thacher & Bartlett
Boris I. Bittker, Esq. Yale Law School Yale Station, Box 401A New Haven, CT 06520	Sterling Professor of Law, Yale University
Robert O. Blake 2211 King Place, N.W. Washington, DC 20007	Senior Fellow, International Institute for Environment and Development
William T. Coleman, Jr., Esq. O'Melveny & Myers 1800 "M" Street Washington, DC 20036	Partner, O'Melveny & Myers
Joan K. Davidson 32 East 64th Street New York, NY 10021	President, The J.M. Kaplan Fund, Inc.
Adrian W. DeWind, Esq. Paul, Weiss, Rifkind, Wharton & Garrison 345 Park Avenue New York, NY 10154	Partner, Paul, Weiss, Rifkind, Wharton & Garrison

Stephen P. Duggan, Esq. Simpson Thacher & Bartlett One Battery Park Plaza New York, NY 10004	Trustee, Institute of International Education
James B. Frankel, Esq. Cooper, White & Cooper 101 California Street, 16th Fl. San Francisco, CA 94123	Attorney; Conservationist
Robert W. Gilmore Global Perspectives in Education, Inc. 218 East 18th Street New York, NY 10003	President, Joyce Mertz-Gilmore Foundation
Francis W. Hatch, Jr. Nine Park Street Boston, MA 02108	Director, Fiduciary Trust Co. and Conservation Law Foundation
Thomas C. Jorling, Esq. Center for Environmental Studies Box 632 Williams College Williamstown, MA 01267	Professor of Environmental Studies, Williams College
Hamilton F. Kean, Esq. 120 East 56th Street, Room 1510 New York, NY 10022	President, Youth Counseling League
Jonathan Z. Larsen 14 East 63rd Street New York, NY 10021	Journalist
Dr. Joshua Lederberg The Rockefeller University 66th Street and York Avenue New York, NY 10021	President, The Rockefeller University
Weyman I. Lundquist, Esq. Heller, Ehrman, White & McAuliffe 44 Montgomery Street San Francisco, CA 94104	Partner, Heller, Ehrman, White & McAuliffe
James Marshall, Esq. Burns, Summit, Rovins & Feldesman 445 Park Avenue New York, NY 10022	Governing Council, The Wilderness Society; Director, The Adirondack Council

Michael McIntosh The McIntosh Foundation 45 Rockefeller Plaza Suite 1965 New York, NY 10020	President, The McIntosh Foundation
Mrs. Carol Noyes Laurel Hollow 1266 Moore's Hill Road Syosset, NY 11791	Member of the Board, Planned Parenthood of NYC and Global Tomorrow Coalition
John B. Oakes The New York Times 229 West 43rd Street New York, NY 10036	Former Senior Editor, *The New York Times*
Franklin E. Parker, Esq. Patterson, Belknap, Webb & Tyler 30 Rockefeller Plaza New York, NY 10112	Partner, Patterson, Belknap, Webb & Tyler
Dr. Gifford B. Pinchot Old Quarry Guilford, CT 06437	Biochemist-Physician; Marine biologist
Robert Redford Wildwood Enterprises 75 Rockefeller Plaza New York, NY 10019	Actor; Conservationist
Nathaniel P. Reed Jupiter Island Box 375 Hobe Sound, FL 33455	Businessman; Conservationist
John R. Robinson, Esq. 150 Purchase Street Rye, NY 10580	Attorney
Laurence Rockefeller, Esq. Natural Resources Defense Council, Inc. 122 East 42nd Street New York, NY 10168	Conservationist
Leonard R. Sargent Colwin Springs, MT 59021	Rancher; Conservationist
Joan C. Schwartz 945 Fifth Avenue New York, NY 10021	Editorial Associate, *Partisan Review*

John Sheehan United Steelworkers of America AFL-CIO Building, Suite 706 815 16th Street, N.W. Washington, DC 20006	Legislative Director, United Steelworkers of America
David Sive, Esq. Winer, Neuburger & Sive 425 Park Avenue New York, NY 10022	Partner, Winer, Neuburger & Sive
Thomas B. Stoel, Esq. Stoel, Rives, Boley, Fraser & Wyse 900 S.W. Fifth Avenue, 23rd Fl. Portland, OR 97204	Partner, Stoel, Rives, Boley Fraser & Wyse
Thomas A. Troyer, Esq. Caplin & Drysdale 1101 17th Street, N.W. Washington, DC 20036	Co-Chairman, National Friends of Jackson Hole
Dr.George M. Woodwell Ecosystems Center Marine Biological Laboratories Woods Hole, MA 02543	Director, Ecosystems Center, Marine Biological Laboratories, Woods Hole

COOPERS & LYBRAND

May 26, 1983

Natural Resources Defense
Council, Inc.
122 East 42nd Street
New York, NY 10007

Dear Sirs:

We have examined the financial statements of Natural Resources Defense Council, Inc. for the years ended December 31, 1980 and December 31, 1981 and have reported thereon under dates of May 22, 1981 and May 5, 1982, respectively. Our examinations were made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

Based upon the procedures referred to in the preceding paragraph, we believe that: (a) the financial statements referred to above were prepared in accordance with the "Standards of Accounting and Financial Reporting for Voluntary Health and Welfare Organizations," published by the National Health Council and the National Assembly for Social Policy and Development, Inc.; and (b) the accounts of the organization are maintained in accordance with the principles of "fund accounting" and accounting procedures in effect have been designed to insure observance of limitations and restrictions placed on the use of resources available. Accordingly, resources for various purposes are classified into funds that are in accordance with activities or objectives specified. Such activities are conducted in accordance with a detailed budget approved at the beginning of the year by the governing board. Significant variations from the approved budget require prior authorization by the board.

This letter has been furnished to you in connection with your application to the Combined Federal Campaign. It should not be used for any other purpose without our prior

consent. It should be recognized, however, that this limitation as to dissemination of the letter does not, in any way, indicate reservations on our part regarding the contents of the letter.

Very truly yours,

COOPERS & LYBRAND

APPENDIX A TO SUBPART D
SOURCE OF FUNDS AND COSTS REPORT
(for the year ending 1982)

Organization: NATURAL RESOURCES DEFENSE COUNCIL

Public Support	
Received Directly:	$
Contributions	$3,175,503
Special Events (net of direct benefit costs of *$20,000*	33,000
Legacies and bequests	17,500
Subtotal	
Received Indirectly:	
Federated Campaigns (e.g., United Way)	
Federal Service Campaigns	
Other Contributions-Combined Federal Campaign	42,278
Subtotal	
Total Support from the Public	$3,268,281
Revenue:	
Grants from Federal Government agencies (including grants in-kind)	36,111
Grants from state or local government agencies (including Medicaid)	
Memberships	1,027,360
Program Service fees (including Medicare)	95,188
Sales of materials and services to member unit (net of direct expenses)	
Sales of materials and services to the public (net of direct expenses)	39,250
Transfers, dues, etc. from affiliated organizations, etc.	
Investment Income	152,700
Gains on invesmtent transactions	17,300
Other Income	
Total revenue	1,367,909
Total Public support and revenue	$4,636,190
Expenses	
Program services	
Environmental	2,668,154
Science	388,096
Public Education	679,167
Subtotal	3,735,417
Supporting Services	
Management and general	388,095
Fund raising	727,678
Subtotal	1,115,773
Total expenses	4,851,190
Excess (deficiency of public support and revenue over expenses	215,000

Natural Resources Defense Council, Inc.

Annual Report
1981 - 82

523

BEST AVAILABLE COPY

(10) and (11)

A copy of NRDC's 1981 financial report/external audit by an independent certified public accountant is enclosed. Coopers & Lybrand has just completed their audit of NRDC for 1982, and we expect to receive a draft of their report in June. We will send you a copy as soon as it becomes available.

NATURAL RESOURCES DEFENSE COUNCIL, INC.

Financial Statements
for the year ended
December 31, 1983

Coopers & Lybrand
Certified Public Accountants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0928

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS,

v.

DONALD J. DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT.

ANSWER

Defendant, by and through his undersigned attorneys, hereby answers plaintiffs' Complaint as follows:

First Defense

The Court lacks jurisdiction over the subject matter of this action.

Second Defense

Plaintiffs have no standing to raise the claims asserted in the Complaint.

Third Defense

Plaintiffs have failed to exhaust available administrative remedies as to some or all portions of their claims.

Fourth Defense

Plaintiffs' action is premature and therefore is not ripe for judicial resolution.

Fifth Defense

The Complaint fails to state a claim upon which relief can be granted.

Sixth Defense

In response to the numbered paragraphs of the Complaint, and adopting the enumeration used therein, defendant avers as follows:

1. This paragraph contains plaintiffs' characterization of their action, to which no response is required;

2-3. These paragraphs contain conclusions of law to which no response is required; to the extent that a response may be deemed required, denied.

4. Admit that plaintiffs are not-for-profit corporations organized in the manner set forth in this paragraph, and that plaintiffs are approved by the United States Internal Revenue Service as charitable, tax-exempt organizations under section 501(c)(3) of the Internal Revenue Code. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the description and characterization of the purpose and activities of plaintiffs, and accordingly those allegations are denied; defendant is also without knowledge or information sufficient to form a belief as to the truth of the allegations that each plaintiff is authorized to sue and be sued under its corporate name, and accordingly those allegations are also denied.

5-7. Defendant admits and confirms the authenticity of Executive Orders Nos. 10927, 12353 and 12404, and the CFC regulations at 5 CFR at Part 950, to which the Court is respectfully referred for a true and accurate statement of the contents thereof.

8. Deny last sentence. Admit that, in the CFC, funds donated by individual federal employees are either "designated" or "deemed designated," and that individuals may designate any organization approved for inclusion in the CFC to receive a specified contribution, either by payroll withholding or by one-time, lump-sum gift. Admit that if an employee chooses the payroll withholding method of contribution, the specified amount of money is automatically deducted from the individual's paycheck and transmitted to the designated agency, and admit that if an individual does not designate a particular agency to receive his or her

funds, the funds are deemed designated to the Principal Combined Fund Organization. Admit that only agencies whose applications are accepted for inclusion into the CFC can receive funds through the CFC, and that except as set forth in 5 CFR § 950.311, an agency that has been denied inclusion in the CFC cannot solicit federal personnel at their places of work or assignment.

9. Admit first sentence. With respect to the remaining allegations of this paragraph, see the response to paragraph 4 of the Complaint *supra*.

10. The last sentence of this paragraph contains conclusions of law to which no response is required; to the extent that a response may be deemed required, deny. With respect to the remaining allegations of this paragraph, see the response to paragraph 4 of the Complaint *supra*.

11. With respect to the allegations contained in this paragraph, see the response to paragraph 4 of the Complaint *supra*.

12. Admit first and second sentences. With respect to the allegations contained in the third sentence of this paragraph, the Court is respectfully referred to the referenced decision. With respect to the allegations contained in the fourth sentence of this paragraph, admit that in 1981 some of the plaintiffs were admitted into the CFC.

13. Admit first sentence. With respect to the allegations contained in the second sentence of this paragraph, the Court is respectfully referred to the referenced regulations for a complete and accurate statement of the contents thereof. With respect to the allegations contained in the third sentence of this paragraph, admit that several of the plaintiffs were admitted into the CFC in 1982, but not solely as a result of the new implementing regulations.

14. Admit that Executive Order 12404 was issued on February 10, 1983 as a result of concerns regarding the CFC, including concerns about the inclusion of certain types of organizations in the CFC. With respect to the allegations concerning the purpose of Executive Order 12404, the Court is respectfully referred to that Executive Order for a complete and accurate statement of the contents thereof.

15. Deny first, third and fourth sentences. With respect to the allegations contained in the second sentence of this paragraph, admit that decisions on applications for the 1983 CFC are unlikely to be issued before July 1983.

16-17. Deny.

18. Deny that plaintiffs are entitled to the relief requested or to any relief whatsoever.

Any allegation of the Complaint not hereinbefore specifically admitted or denied is hereby denied.

WHEREFORE, defendant, having fully answered, prays that the Complaint be dismissed with prejudice and that the Court order such other and further relief as it may deem appropriate, including defendant's costs and attorneys' fees in this action.

Respectfully submitted,

/s/ Stanley S. Harris
STANLEY S. HARRIS
United States Attorney

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
Assistant United States Attorney

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0928

THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS

v.

DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT.

SUPPLEMENTAL AFFIDAVIT OF EMANUAL A. OWENS

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

EMANUEL A. OWENS, being duly sworn, deposes and says:

1. Attached to Exhibit T is a true and accurate copy of a letter and enclosures received by myself in my capacity as CFC co-ordinator of the NAACP Legal Defense and Educational Fund, Inc. from the Peninsula (Virginia) CFC.

2. The letter states that the NAACP/LDF has been rejected for participation in the local 1983 CFC because of Executive Order 12404.

3. The NAACP/LDF is filing an appeal to the Office of Personnel Management from the denial pursuant to the regulations that are presently in effect.

/s/ Emanuel A. Owens
EMANUEL A. OWENS

Subscribed and sworn to before me this 24th day of June, 1983.

/s/ Gloria A. Jones
GLORIA A. JONES
Notary Public

PENINSULA COMBINED FEDERAL CAMPAIGN

June 15, 1983

NAACP Legal Defense and Educational Fund, Inc.
ATTN: Mr. Emanuel A. Owens, Jr.
Coordinator CFC
10 Columbus Circle
New York, NY 10019

Dear Mr. Owens:

In carefully reviewing your organization's application for inclusion in our local 1983-84 Combined Federal Campaign, special consideration was given your application by our local CFC Coordinating Committee. In light of the new Executive order, which states limited eligibility for participation, your organization does not meet the eligibility criteria and, therefore, your application is disapproved.

I have enclosed a copy of the Executive order and a newsletter that gives you the full details of this year's eligibility for participation.

Sincerely,

/s/ Byron E. Gibson
BYRON E. GIBSON
Chairman
Peninsula Combined Federal Campaign

2 Enclosures
As stated

APPENDIX A

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

June 27, 1983

MEMORANDUM FOR 1982 CFC PARTICIPANTS, APPLICANTS FOR THE FALL 1983 CFC, AND ORGANIZATIONS THAT HAVE INQUIRED ABOUT CFC PARTICIPATION

SUBJECT: Proposed Changes to Combined Federal Campaign Regulations

Attached are proposed changes to the regulations governing the Combined Federal Campaign, which are necessary to implement Executive Order No. 12404. I encourage your comments and suggestions.

We expect to issue the final regulatory changes as soon as possible following the close of the 30-day public comment period. When we do, we will send you the final regulations and notify you of the deadline by which applications are due in our office.

Because of the short time-frame for organizing the 1983 Campaign, we urge those organizations that plan to apply to submit both their national (three complete copies) and local applications under the guidelines set forth in the proposed regulations and to submit those applications as soon as possible. (Attached is the list of local Federal Coordinating Committees.) Those organizations that submit 1983 applications under the 1982 regulations should now update their applications. And all applications will have to be updated to conform to any changes that may appear in the final regulations.

For your information, here are the specific actions that must be taken before local campaigns can get under way. We anticipate that we will be able to adhere to this schedule.

Public comment period ends	July 25
Regulations issued in final form	August 1
Applications or application revisions due in OPM from national voluntary agencies (NVAs)	August 15
National Eligibility Committee meets	August 31
Director's decision on NVAs	August 31
Director's decision on appeals from NVAs	September 9

/s/ Donald J. Devine
DONALD J. DEVINE
Director

APPENDIX B

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

August 20, 1983

CFC MEMORANDUM NO. 82-11

MEMORANDUM FOR CHAIRMEN AND CHAIRWOMEN, FEDERAL COORDINATING COMMITTEES, NATIONAL VOLUNTARY AGENCIES, AND FEDERATED GROUPS

SUBJECT: Final Assignment of Voluntary Agencies to Federated Groups; Implications for Local Eligibility.

In light of guidance contained in FPM Letter 950-1, which was attached to CFC Memorandum No. 82-8, we have just completed a review of the assignments of voluntary agencies to federated groups that were made on July 23, 1982, as set forth in CFC Memorandum No. 82-4. As a result of that review, four changes in federation assignment have been made. The final list of assignments for the 1982 campaign is shown below, with an asterisk beside those agencies whose assignments have been changed.

Your special attention is drawn to two of these changes since there are implications for local eligibility decisions:

1) The United Seamen's Service provides a substantial preponderance of its services overseas and so is now listed as an International Service Agency. As such, it is not required to demonstrate a local presence. The United Seamen's Service is therefore eligible to participate in all local campaigns.

2) Because the Special Olympics agency does not provide a substantial preponderance of its services overseas, it has been assigned to the National Service Agencies. Normally, therefore, this agency would have to apply to each of the local Federal Coordinating Committees and demonstrate a local presence in order to be eligible to participate in local campaigns. Due to the lateness of this change of federation assignment, however, the local application and presence requirements are waived for this agency this year. Accordingly, Special Olympics is also eligible to participate in all local campaigns for the 1982 CFC.

RECOGNIZED NATIONAL VOLUNTARY AGENCIES

1. *Local United Ways, Funds, Community Chests and Other Federated Groups* which are members in good standing of, or are recognized by, the United Way of America.

2. *National Health Agencies* (Domestic and overseas areas).

AMC Cancer Research Center and Hospital
American Cancer Society
American Diabetes Association
American Hearing Research Foundation
American Heart Association
American Kidney Fund
American Lung Association
American Paralysis Association
*American Social Health Association
Amyotrophic Lateral Sclerosis Association of America
Arthritis Foundation
Association for Retarded Citizens of the U.S.
City of Hope
Cooley's Anemia Foundation
Cystic Fibrosis Foundation
Epilepsy Foundation of America
Juvenile Diabetes Foundation
Leukemia Society of America
Little City Foundation
March of Dimes Birth Defects Foundation
*Medic Alert Foundation International
Muscular Dystrophy Association
Myasthenia Gravis Foundation
National Association for Sickle Cell Disease
National Easter Seal Society
National Foundation for Ileitis and Colitis
National Hospice Organization
National Hemophilia Foundation
National Huntington's Disease Association

National Jewish Hospital and Research Center/National Asthma Center
National Kidney Foundation
National Mental Health Association
National Multiple Sclerosis Society
National Retinitis Pigmentosa Foundation
National Reye's Syndrome Foundation
National Society for Autistic Children
National Society to Prevent Blindness
National Spinal Cord Injury Foundation
Research to Prevent Blindness
St. Jude Children's Research Hospital
Tuberous Sclerosis Association of America
United Cerebral Palsy Associations

3. *International Service Agencies* (Domestic and overseas).

African Medical and Research Foundation
Africare
American Near East Refugee Aid
CARE
Church World Service
Direct Relief Foundation
Foster Parents Plan
Helen Keller International
International Eye Foundation
International Human Assistance Programs
International Rescue Committee
International Social Service, American Branch, Inc.
Meals for Millions/Freedom from Hunger Foundation
National Council for International Health
Oxfam-America
Pearl S. Buck Foundation
Project Concern International
Project HOPE (People-to-People Health Foundation)
Save the Children Federation
Technoserve
Unitarian Universalist Service Committee
*United Seamen's Service
United States Committee for UNICEF
World Education

World Wildlife Fund—U.S.

4. *International Service Agencies—Overseas Area*

All International Service Agencies, plus
Armed Services Department, YMCA
Boy Scouts of America, Overseas Councils
Girl Scouts of America, Overseas Affiliates
Goodwill Industries of America, International Division
National Recreation and Park Association
Opportunities Industrialization Centers International
Planned Parenthood—World Population
Special Olympics

5. *United Service Organizations* (USO) (Overseas area).

6. *National Service Agencies* (Domestic area).

American Foundation for the Blind
Capital Legal Foundation
CENIKOR Foundation
Center for Auto Safety
Center for Science in the Public Interest
Children's Defense Fund
Conservative Legal Defense and Education Fund
Federally Employed Women Legal and Education Fund
Indian Law Resource Center
Lawyers' Committee for Civil Rights Under Law
Martin Luther King, Jr. Center for Nonviolent Social Change
NAACP Legal Defense Fund Educational Fund
NAACP Special Contribution Fund
National Audubon Society
National Black Media Coalition
National Black United Fund
National Child Labor Committee
National Committee for Prevention of Child Abuse
National Congress of American Indians Fund
National Council of Negro Women
National Image
National Organization for Women Legal Defense and Education Fund
National Parks and Conservation Association

National Recreation and Park Association
National Right to Life Educational Foundation
National Right to Work Legal Defense Foundation
Native American Rights Fund
Natural Resources Defense Council
Pacific Legal Foundation
Planned Parenthood-World Population
Puerto Rican Legal Defense and Education Fund
Sierra Club Legal Defense Fund
*Special Olympics
United Negro College Fund
United Service Organizations
U.S. Olympic Organizations
U.S. Olympic Committee
Vietnam Veterans of America Foundation
Wilderness Society

RECOGNIZED FEDERATED AGENCIES

American Red Cross
International Service Agencies
International Service Agencies—Overseas Area
National Health Agencies
National Service Agencies
National Voluntary Organizations Campaign Committee
United Way of America

/s/ Donald J. Devine
DONALD J. DEVINE
Director

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0928

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL., PLAINTIFFS,

v.

HONORABLE DONALD J. DEVINE, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, DEFENDANT.

SUPPLEMENTAL AFFIDAVIT

P. Kent Bailey, being duly sworn, deposes and says:

1. I am the program analyst providing staff support to the Assistant to the Deputy Director for Regional Operations, United States Office of Personnel Management (OPM). The Office of the Assistant to the Deputy Director is the office with primary responsibility for support to the Director of OPM in the administration of the Combined Federal Campaign (CFC). The statements made herein are based upon personal knowledge obtained in the course of performing the official duties assigned to me.

2. Initially, OPM estimated a 7 to 7.5 percent increase in fall 1982 CFC contributions compared to fall 1981 contributions. This was arrived at by using a projected $100 million for fall 1982 and $93 million for fall 1981. Since then, the International Service Agencies Group staff has determined that, based on a close and complete review of fall 1981 results, the actual fall 1981 amount is $95,404,942. The OPM projection of $100 million was revised to $99 million based on additional reports received. I understand that the United Way of America estimates $97.7 million for the fall 1982 CFC.

3. Based on these changes, the following table shows the summary information for the fall 1980, 1981, and 1982 Campaigns:

	Contributions	% Increase from Prior Year	% Designated	% Participation
Fall 1982	$99,000,000	3.8	62.7	63.2
Fall 1981	95,404,942	9.6	49.5	64.7
Fall 1980	87,051,770	5.1	45.9	59.4

/s/ P. Kent Bailey
P. KENT BAILEY

Sworn to and subscribed before me this 30th day of June, 1983, in the City of Washington, District of Columbia.

/s/ Helen B. Welch
HELEN B. WELCH
Notary Public

My Commission expires: 3-31-87

EXHIBIT B

FEDERAL BUILDING & POST OFFICE
100 EAST "B" STREET ROOM 100
CASPER, WYOMING 82601

December 21, 1982

Joseph A. Morris
Office of Personnel Management
Office of the General Counsel
Washington, DC 20415

Dear Mr. Morris;

The Combined Federal Campaign Committee has complied with the directive from OPM regarding reinstatement of agencies to the CFC.

Sincerely,

/s/ J. M. O'Meara
JAMES M. O'MEARA, Chairman
Combined Federal Campaign Committee

December 1, 1983

Mr. James M. O'Meara
Chairman
Combined Federal Campaign for
Natrona County
%Casper Federal Executive's Council
Federal Building and Post Office
100 East B Street, Room 1002
Casper, Wyoming 82601

Dear Mr. O'Meara:

We have received a copy of your letter dated October 29, 1982, which was sent to "All National Service Agencies." In your letter, you inform the addressees that, "The Combined Federal Campaign Committee of the Casper Federal Executive's Council has voted to exclude all agencies listed under the National Service Agencies umbrella group ... (because) a large number of these agencies are of a primarily controversial political nature, ... and such organizations are not in keeping with the intent and spirit of the Combined Federal Campaign."

Your letter evidences an utter disregard for the published criteria to be applied by Local Federal Coordinating Committees (LFCCs) in making local eligibility determinations on the applications of national voluntary agencies to participate locally in the Combined Federal Campaign (CFC). The only decision to be made by LFCC in this process is whether or not the national voluntary agency has a direct and substantial presence in the local campaign community. An organization which meets the published eligibility criteria cannot, under the First Amendment to the United States Constitution, be excluded from participation in the CFC simply because it is controversial.

As you undoubtedly are aware by now, the Director of the United States Office of Personnel Management has overruled several of the eligibility determinations which were made by your LFCC. The Director's decisions were made following a careful review and application of appropriate CFC guidelines. The decisions are final, as provided in

the CFC regulations at 5 CFR § 950.407(d), and we expect your LFCC to faithfully comply with the decisions.

"There are many features of the rules presently governing the CFC which merit review. I assure you that intensive examination of the campaign's ground rules is underway. Meanwhile, of course, public servants are obliged to enforce the law as it exists, rather than as they would wish it to exist. I'm sure that in the future, you will see fit to abide by this principle.

Sincerely yours,

/s/ Joseph A. Morris

JOSEPH A. MORRIS
General Counsel

OGC:SRICK:nm 11/15/82

CASPER FEDERAL EXECUTIVES COUNCIL
FEDERAL BUILDING & POST OFFICE
100 EAST "B" STREET ROOM 1002
CASPER, WYOMING 82601

October 29, 1982

To: All National Service Agencies

The Combined Federal Campaign Committee of the Casper Federal Executive's Council has voted to exclude all agencies listed under the National Service Agencies umbrella group. It is the determination of the Committee that a large number of these agencies are of a primarily controversial political nature, and that such organizations are not in keeping with the intent and spirit of the Combined Federal Campaign.

Based on the above, your agency will not be included in the 1983 Combined Federal Campaign for Natrona County.

/s/ James M. O'Meara
JAMES M. O'MEARA
Chairman, Combined Federal
Campaign for Natrona County

Supreme Court of the United States

No. 84-312

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND,
INC., ET AL.

ORDER ALLOWING CERTIORARI. Filed October 29, 1984.

The Petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

Justice Marshall took no part in the consideration or decision of this petition.

Office-Supreme Court, U.S.
FILED
DEC 20 1984
ALEXANDER L. STEVAS
CLERK

No. 84-312

In the Supreme Court of the United States

OCTOBER TERM, 1984

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND,
INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

CAROLYN F. CORWIN
Assistant to the Solicitor General

PAUL BLANKENSTEIN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOSEPH A. MORRIS
General Counsel
Office of Personnel Management
Washington, D.C. 20415

QUESTION PRESENTED

Whether Executive Order No. 12,404, which limits participation in the Combined Federal Campaign to traditional health and welfare charities and thus excludes legal advocacy groups, violates the First Amendment.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Sierra Club Legal Defense Fund, Inc.; the Puerto Rican Legal Defense and Education Fund, Inc.; the Federally Employed Women Legal and Education Fund, Inc.; the Indian Law Resource Center; the Lawyers' Committee for Civil Rights Under Law; and the Natural Resources Defense Council, Inc., are respondents.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-312

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND,
INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-76a) is reported at 727 F.2d 1247. The opinion of the district court (Pet. App. 84a-97a) is reported at 567 F. Supp. 401.

JURISDICTION

The judgment of the court of appeals (Pet. App. 77a-78a) was entered on February 17, 1984. A petition for rehearing was denied on April 30, 1984 (Pet. App. 79a-83a). On July 18, 1984, Justice White extended the time within which to file a petition for a writ of certiorari to and including August 28, 1984. The petition was filed on that date and was granted on October 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

EXECUTIVE ORDER INVOLVED

Executive Order No. 12,404, 3 C.F.R. 151, provides in pertinent part:

> By the authority vested in me as President by the Constitution of the United States of America, and in order to lessen the burdens of Government and of local communities in meeting needs of human health and welfare, it is hereby ordered as follows:
>
> Section 1. Executive Order No. 12353 of March 23, 1982, is amended as follows:
>
> (a) By deleting Section 1 of that Order and inserting in its place the following provision:
>
> "Section 1. The Director of the Office of Personnel Management shall make arrangements for voluntary health and welfare agencies to solicit contributions from Federal employees and members of the uniformed services at their places of employment or duty. These arrangements shall take the form of an annual Combined Federal Campaign in which eligible voluntary agencies are authorized to take part."
>
> (b) In Section 2 insert "(a)" after the Section number and add the following new subsection after the existing provision:
>
> "(b) In establishing those criteria [for determining the eligibility of voluntary agencies that may participate in each of the annual Combined Federal Campaigns], the Director shall be guided by the following principles and policies:
>
> "(1) The objectives of the Combined Federal Campaign are to lessen the burdens of government and of local communities in meeting needs of human health and welfare; to provide a convenient channel through which Federal public servants may contribute to these efforts; to minimize or eliminate disruption of the Federal workplace and costs to Federal taxpayers that such fund-raising may entail; and to avoid the reality and appearance of the use of Federal resources in aid of fund-raising for political activity or advocacy of public policy, lobbying, or philanthropy of any kind that does not directly serve needs of human health and welfare.
>
> "(2) To meet these objectives, eligibility for participation in the Combined Federal Campaign shall be limited to voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families. * * * Such services must directly benefit human beings * * *. Such services must consist of care, research or education in the fields of human health or social adjustment and rehabilitation; relief of victims of natural disasters and other emergencies; or assistance to those who are impoverished and therefore in need of food, shelter, clothing, education, and basic human welfare services.
>
> "(3) Agencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves shall not be deemed charitable health and welfare agencies and shall not be eligible to participate in the Combined Federal Campaign."

STATEMENT

1. Background Of The Combined Federal Campaign

The federal government annually solicits more than $100 million in charitable contributions from its civilian and military employees through a government-wide charitable fund-raising drive known as the Combined Federal Campaign. The Campaign is conducted by volunteer federal employees, in the federal workplace, on government time, and largely at government expense. 5 C.F.R. 950.103(d) and (e). All organizations that wish to re-

ceive funds solicited in the federal workplace must do so within the framework of the Campaign.[1] No group, including those that receive contributions through the Campaign, may itself engage in any on-the-job solicitation of federal employees. See 5 C.F.R. 950.507(a).

Prior to 1957, there were no government-wide rules governing solicitation by charitable organizations in the federal workplace. Some organizations had access to parts of the federal workplace on an ad hoc basis. In some federal facilities managers did not permit any solicitation; in others, there were no restrictions, and solicitations occurred so frequently that they disrupted the workplace. Pet. App. 3a; J.A. 308-309. In facilities in which solicitations were permitted, "it was not uncommon for a collection to be taken up each week on behalf of one charity or another" (*id.* at 309), often by "the passing around of an empty coffee can" (*id.* at 308). Federal officials in some facilities "were besieged by dozens of agencies seeking endorsements and the privilege of soliciting employees on the job." U.S. Civil Service Comm'n, *Manual on Fund-Raising Within the Federal Service for Voluntary Health and Welfare Agencies* § 1.1 (1977) [hereinafter cited as *Manual on Fund-Raising Within the Federal Service*].[2]

The initial attempt to bring some order to these fund-raising activities came in 1957, when President Eisenhower issued Executive Order No. 10,728, 3 C.F.R. 387

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[1] Locations in which there are fewer than 200 federal employees are not required to participate in the Campaign, but may make alternative arrangements. 5 C.F.R. 950.507(d).

[2] Until recently the Campaign was conducted pursuant to the provisions of the *Manual on Fund-Raising Within the Federal Service*, originally issued in 1963. Beginning in 1982, the Office of Personnel Management has promulgated regulations implementing the executive orders governing the Campaign. See page 9 note 9, *infra*.

We are lodging a copy of the *Manual on Fund-Raising Within the Federal Service* with the Clerk of the Court and providing copies to counsel for respondents and amici.

(1954-1958 comp.). That executive order established general procedures and standards for "a uniform fund-raising program of true voluntary giving" (*id.* § 1(a)) applicable to all executive departments and agencies, including the armed forces. The executive order directed that there be no more than three charitable solicitations annually (*id.* § 1(b)); established a system for approving requests from national "voluntary health and welfare" agencies for participation in the program (*id.* §§ 1(c), 3(d)); and directed that federal employees "be subjected to a minimum of disturbance" while on duty (*id.* § 1(d)). Each participating charitable organization was to be given the opportunity to inform potential givers of its purposes and operations, and an employee could choose the organization that would receive his gift (*id.* § 1(f) and (h)). The executive order established the President's Committee on Fund-Raising Within the Federal Service, which was responsible for reviewing and modifying the fund-raising program (*id.* §§ 2, 3). The Committee also was given the task of reviewing requests for participation in the drive and assigning the appropriate solicitation periods to organizations found to be eligible for participation (*id.* § 3(d)).

In 1961, President Kennedy laid the foundation for the program that came to be known as the Combined Federal Campaign. He abolished the Committee on Fund-Raising Within the Federal Service and revoked the 1957 executive order. In place of the old executive order President Kennedy issued Executive Order No. 10,927, 3 C.F.R. 454 (1959-1963 comp.). Like the 1957 directive, the 1961 order provided that giving must be truly voluntary, that specific solicitation periods were to be designated, and that there should be no more than three solicitations annually (*id.* § 2(b)).[3] Unlike the

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[3] Within a few years of the issuance of the 1961 executive order, federal officials determined that Campaign activities should be consolidated into a single solicitation drive, normally conducted during a six-week period in the fall. See 5 C.F.R. 950.103(b); *Combined Federal Campaign: Hearings Before the Subcomm. on*

1957 order, the 1961 order did not set out additional operating guidelines, but instead directed the Chairman of the Civil Service Commission to "make arrangements for such national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate to solicit funds from Federal employees and members of the armed forces at their places of employment or duty stations" (*id.* § 2(a)).[4]

For the next 20 years, the provision for participation in the Campaign by "national voluntary health and welfare agencies and such other[s] * * * as may be appropriate" caused little controversy. That provision was understood by all concerned as limiting participation in the Campaign to those charities that engaged in medical research or that provided traditional health and welfare services directly to needy people. J.A. 309-310.[5] This

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the Civil Service of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess. 11-12 (1979) (statement of Alan K. Campbell, Director, Office of Personnel Management).

[4] These duties were transferred to the Director of the Office of Personnel Management when the Civil Service Commission was abolished in 1978.

[5] The Director of the Office of Personnel Management described the history of the Campaign as follows:

> Everyone seemed to understand that the Combined Federal Campaign was intended to support the traditional kinds of charities that undertake research into the causes and cures of dread diseases or that render health and welfare services directly to needy people. The world of not-for-profit organizations had always included many other kinds of groups and institutions, of course, ranging from private schools and universities to opera guilds, sports associations, recreation societies, and many more, including the newer "advocacy groups" such as legal defense funds and public policy research organizations, all of which number today in the many tens of thousands. But it had never been thought appropriate—and certainly not practical—for these kinds of institutions to participate in the Combined Federal Campaign, especially since they were not engaged in supplying health and welfare services directly to human beings who were ill, infirm, poor, or distressed, thereby lessening the burdens of government in meeting such needs.

Statement of Donald J. Devine before the Subcomm. on Manpower and Housing of the House Comm. on Government Operations, 98th Cong., 1st Sess. 3-4 (Mar. 24, 1983), *reprinted in* J.A. 309-310.

understanding was codified in the *Manual on Fund-Raising Within the Federal Service* (see note 2, *supra*), which stated that participation in the Campaign was confined to charitable organizations "providing direct services to persons in the fields of health and welfare services" (*id.* § 5.21).

However, in 1980, several legal advocacy groups ("legal defense funds")[6] applied to participate in the Campaign. The Office of Personnel Management denied those applications on the ground that the groups did not meet the "direct services" requirement articulated in the *Manual*. The groups then filed suit in federal district court in an attempt to gain admittance to the Campaign. In *NAACP Legal Defense & Educational Fund, Inc.* v. *Campbell* (*NAACP I*), 504 F. Supp. 1365 (D.D.C. 1981), the court held that the "direct services" requirement, as it was then employed, was unconstitutionally vague and could not be used as a basis for excluding organizations from participation in the Campaign.

Following the ruling in *NAACP I*, the Office of Personnel Management concluded that it was obliged to allow groups other than traditional health and welfare charities to participate in the Campaign, at least until more precise standards for determining eligibility could be developed. See J.A. 53-59, 104-105. In addition to respondents in this case, new participants in the Campaign included, inter alia, the Conservative Legal De-

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[6] We use the terms "legal advocacy groups" and "legal defense funds" to refer generally to organizations that provide legal services to clients based on whether the clients have a cause or claim that the legal defense funds wish to advance; the term "legal aid societies" refers to organizations that make legal services available to clients on the basis of financial need, without distinguishing on the basis of a particular cause. See 5 C.F.R. 950.101(a)(1)(i)(H).

fense and Education Fund, the National Right to Work Legal Defense Foundation, the Center for Auto Safety, and the National Organization for Women Legal Defense and Education Fund. *Id*, at 427-428. Inclusion of these advocacy groups caused a wide range of individuals and groups to complain that the Campaign was being politicized and that participation by such non-traditional groups would destroy the spirit of cooperation that had marked the Campaign in the past. See pages 36-41, *infra*. The change in the traditional scope of the Campaign brought open resistance in some quarters. For example, in 1982 a number of federal employee unions threatened to boycott the Campaign; in some cases those threats were carried out. See Pet. App. 63a-66a.[7]

2. Structure And Operation Of The Campaign Under Executive Order No. 12,404 [8]

In the period following the decision in *NAACP I*, President Reagan took several steps to respond to that decision and otherwise to improve the administration of the Campaign. In 1982, the President issued Executive Order No. 12,353, 3 C.F.R. 139 (1983), which replaced the 1961 order issued by President Kennedy. The 1982

[7] See also, *e.g.*, 48 Fed. Reg. 29458 (1983); *Executive Orders 12353 and 12404 As They Regulate the Combined Federal Campaign: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 98th Cong., 1st Sess. Pt. 1, at 69-70 (1983) (statement of Donald J. Devine).

[8] The description of the Campaign in this section and at later points in the brief reflects the regulatory scheme promulgated by the Office of Personnel Management in 1983 to implement Executive Order No. 12,404. OPM recently revised those regulations in an effort to comply with the decisions below pending further review. See 49 Fed. Reg. 32735 (1984). The new regulations changed both the eligibility criteria (which are at issue in this case) and certain operational features of the Campaign, so that the Campaign could proceed in the fall of 1984. The preamble to the new regulations states that they are issued "without prejudice to [OPM's] right or duty further to modify the rules in the event of a supervening direction from a court, the Congress, or the President" (*ibid.*).

executive order, in language very similar to that of the 1961 order, provided that the Director of OPM should make arrangements for a Campaign involving "national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate" (*id.* § 1). The order authorized the Director to establish criteria for determining eligibility for Campaign participation (*id.* § 2). In addition, it authorized the Director to use private groups, known as "principal combined fund organizations," to assist in managing the Campaign at the local level (*id.* § 5).[9]

In February 1983, President Reagan issued Executive Order No. 12,404, 3 C.F.R. 151, which establishes the Campaign eligibility criteria that are at issue in this case.[10] The new executive order was designed to cure the vagueness of the former "direct services" criterion, which had been condemned by the district court in *NAACP I*, and to return the Campaign to its original scope.

Section 1(b) of Executive Order No. 12,404 limits eligibility for the Campaign to "voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families." In order to qualify under this criterion, an organization's services must consist of:

> (1) care, research or education in the fields of human health or social adjustment and rehabilitation;
>
> (2) relief of victims of natural disasters and other emergencies; or

[9] Following the issuance of Executive Order No. 12,353, OPM promulgated a comprehensive regulatory scheme to take the place of the *Manual on Fund-Raising Within the Federal Service*. See 47 Fed. Reg. 29496 (1982), codified at 5 C.F.R. Pt. 950. These regulations were amended in 1983 and 1984. See 48 Fed. Reg. 29458 (1983); 49 Fed. Reg. 32735 (1984).

[10] Executive Order No. 12,404 took the form of an amendment to Executive Order No. 12,353.

(3) assistance to those who are impoverished and therefore in need of food, shelter, clothing, education, and human welfare services.

The order specifically excludes from the definition of charitable health and welfare agencies those organizations "that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves" (*ibid.*).[11]

The executive order explains that the purposes of the Campaign, and the rationale for the eligibility criteria, are to: (1) lessen the burdens of government and local communities in supplying health and welfare services to individuals and families; (2) provide a convenient channel through which federal employees may contribute to these efforts; (3) minimize or eliminate disruption in the federal workplace and the costs of fundraising; and (4) avoid the fact and appearance of government support for organizations that engage in partisan political activity or that focus their activities on advocacy of particular viewpoints or causes. Exec. Order No. 12,404, § 1(b).

Under the new executive orders, as in the past, all supervisory and oversight personnel for the Campaign are federal officials. 5 C.F.R. 950.103(c) and (d), 950.201 *et seq.* The Director of OPM or his delegate makes all policy, procedural, and eligibility decisions for the Campaign. Exec. Order No. 12,353; 5 C.F.R. 950.201 (a). The Director may authorize a private umbrella organization, known as a principal combined fund organization (PCFO), to provide administrative support services in connection with federal officials' conduct of a local Campaign. Exec. Order No. 12,353, § 5; 5 C.F.R. 950.211(e). The PCFO, which is usually a United Way affiliate, may be responsible for accounting for amounts

[11] The implementing regulations permit an otherwise eligible organization to expend up to 15% of its total annual expenditures for lobbying and litigation activities without losing eligibility to participate in the Campaign. See 5 C.F.R. 950.101(a)(2).

pledged and disbursement to designated organizations, as well as printing and preparation of informational materials. 5 C.F.R. 950.509(e) and (h), 950.521. The administrative expenses of the PCFO are reimbursed from the funds raised in the Campaign. 5 C.F.R. 950.509(e).

The PCFO and participating charities do not engage in any direct solicitation of funds from employees. That task is performed solely by federal employees themselves. Employee volunteers (known as keyworkers) distribute to their colleagues pledge cards and copies of a contributor's leaflet, which contains a list of participating charities and brief, 30-word statements about the nature of each charity's program. 5 C.F.R. 950.521(e)(2). These materials are "developed in the local area under direction of the local Federal [officials conducting the Campaign]" and are subject to the approval of those officials. 5 C.F.R. 950.521(a). The 30-word statements must be descriptive, may not contain particularized appeals for funds, and must be prepared "without undue use of voluntary agency symbols or other distractions that compete for the contributor's attention." 5 C.F.R. 950.521(d).

Federal employees may donate lump sums or may request that specified amounts be withheld from their salaries under a government payroll deduction plan. Employees may designate one or more of the organizations listed in the contributor's leaflet to receive their donations. Undesignated contributions are paid to the PCFO, which takes responsibility for distributing those funds to other organizations participating in the Campaign. 5 C.F.R. 950.509(e) and (g), 950.513, 950.519(d), 950.523. See Pet. App. 88a. Only designated contributions are at issue in this case at this stage of the proceedings.

3. Proceedings In This Case

a. Following the issuance of Executive Order No. 12,404, respondents, seven legal defense funds, brought this action in the United States District Court for the District of Columbia, seeking to enjoin their exclusion from the Campaign. Respondents contended that their

First and Fifth Amendment rights would be violated if participation in the Campaign were limited to traditional health and welfare charities in accordance with Executive Order No. 12,404.

The district court permanently enjoined the government from excluding respondents from eligibility to receive designated contributions through the Campaign (Pet. App. 84a-99a). Applying *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37 (1983), the court held that, "to the extent that it permits numerous charitable organizations to present their messages to federal employees," the Campaign constitutes a "limited public forum" subject to First Amendment constraints (Pet. App. 90a). The court characterized the restrictions on participation as a content-based prohibition (*id.* at 91a) and concluded that the reasons set forth in Executive Order No. 12,404 for those restrictions were insufficient to justify exclusion of respondents from eligibility to receive designated contributions through the Campaign (Pet. App. 92a-94a).[12]

b. A divided panel of the court of appeals affirmed (Pet. App. 1a-76a). Judge Edwards, writing for the majority, found it unnecessary to decide whether the Campaign constituted a "limited public forum" or a "nonpublic forum" under *Perry Education Assn.* because, in

[12] The district court determined that respondents' claim that they should not be excluded from receipt of *un*designated contributions received by the Campaign appeared to be more appropriately subject to equal protection analysis than to First Amendment review. It concluded, however, that consideration of this issue would be premature because final regulations implementing Executive Order No. 12,404 had not yet been promulgated. The court therefore dismissed the claim of access to undesignated funds without prejudice. Pet. App. 89a, 95a. Respondents did not appeal this holding.

The district court earlier rejected petitioner's motion to dismiss the complaint on the ground that respondents' challenge to the eligibility criteria would not be ripe until regulations implementing the executive order had been promulgated (J.A. 274, 335-337). Petitioner did not appeal that ruling.

the court's view, the exclusion of respondents did not satisfy even the reasonableness standard applicable to measures restricting speech in nonpublic forums (Pet. App. 16a-20a).[13] The court asserted that it was necessary to examine carefully the government's justification for restricting participation in the Campaign because there was no difference in "status" between the excluded organizations and those that participate in the Campaign. *Id.* at 20a-24a.

The court of appeals rejected the government's explanation that limiting participation in the Campaign to traditional health and welfare charities would decrease the burden on the government to provide such services (Pet. App. 24a-25a). The court noted that the litigation efforts of respondents had resulted in benefits to needy people, as well as enforcement of laws protecting the health of society through promotion of a clean environment. *Id.* at 24a-25a & n.13.

The court of appeals also rejected the government's explanation that advocacy, litigation, and lobbying groups were excluded from the Campaign in order to avoid the appearance of government support for partisan causes (Pet. App. 25a-27a). The court observed that legal defense funds were not considered to be political action groups for purposes of the Internal Revenue Code (*id.* at 25a-26a). The court expressed doubt that legal defense funds could constitutionally be excluded on the ground that their controversial nature might result in disruption of the workplace and pose a danger to the fundraising purposes of the Campaign (*id.* at 28a-31a). In addition, the court found no "tangible evidence in the record suggesting that some real and serious disruptions of the workplace will likely occur" (*id.* at 32a).

The court of appeals discounted the government's suggestion that without eligibility limitations the government would be inundated with philanthropic organizations seek-

[13] Judge Wright would have found that the Campaign constituted a "limited public forum" and that the First Amendment requirements applicable to such a forum were not satisfied (Pet. App. 42a).

ing to participate in the Campaign (Pet. App. 35a-36a). The court further concluded that the availability to respondents of alternative means of communication with federal employees was essentially irrelevant to analysis of the reasonableness of the Campaign limitations (*id.* at 26a-37a). The court ended by criticizing the dissenting opinion for applying a "rational basis test," rather than a reasonableness test (*id.* at 38a-39a).[14]

Judge Starr dissented (Pet. App. 43a-76a). In his view, because this case involved a nonpublic forum, the majority had employed "a stringent standard of review under the guise of a 'reasonableness test' that comports not at all with the deferential standard demanded by Supreme Court precedent" (*id.* at 44a). Judge Starr noted that there was ample record evidence that inclusion of the legal advocacy groups had caused losses during the 1983 Campaign and had threatened the future success of the Campaign (*id.* at 62a-66a). He stated that the limitations on Campaign participation articulated in Executive Order No. 12,404 constituted a reasonable means of minimizing disruption in the federal workplace and avoiding the appearance of governmental favoritism toward advocacy groups (*id.* at 66a-70a). Accordingly, Judge Starr concluded that limitation of participation in the Campaign to traditional health and welfare charities was constitutional because it was both reasonable and viewpoint-neutral.[15]

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[14] The court of appeals also rejected the government's argument that the Campaign cannot properly be described as any sort of First Amendment "forum" since the participating charities are not permitted to send representatives into the federal workplace and communicate only indirectly with federal employees. Pet. App. 14a-17a. Although acknowledging that the Campaign involves an "element of 'subsidization'" (*id.* at 16a), the court disagreed with the government's contention that exclusion of respondents from the Campaign implicated not First Amendment interests, but only equal protection concerns.

[15] Judge Starr found it unnecessary to reach the government's argument that the exclusion should be measured against equal protection standards (Pet. App. 45a n.1).

c. The court of appeals denied the government's suggestion for rehearing en banc by a vote of four to four (Pet. App. 80a-83a).[16] Judge Starr, joined by Judges Wilkey, Bork and Scalia, filed a dissenting statement. The dissenters noted that the panel's invocation of tax exempt status as the linchpin of its analysis would make it "difficult, if not impossible, for the federal government to exclude on a principled basis any of the hundreds of thousands of organizations across the country that enjoy [such] status" (*id.* at 82a). They concluded that en banc consideration was warranted "because of the enormous potential impact of this case on the [Campaign]; because of its critical misinterpretation of important First Amendment doctrine; and because of its misapplication of the standard for affirming the grant of summary judgment on appeal" (*id.* at 82a-83a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Through six different Administrations, beginning with the Kennedy Administration in 1961, the federal government (like many private employers that sponsor charity drives in the workplace) has limited participation in the Combined Federal Campaign to those traditional charities whose mission is to feed the hungry, heal the sick, or educate the ignorant. The success of the Campaign in attracting charitable contributions from federal employees has surely been attributable in substantial part to agreement by all involved in the Campaign that these traditional charities serve the public good. That consensus is one that transcends political, cultural, and philosophical differences. It seems entirely sensible for the government to continue to focus the efforts of the Campaign on assistance to the groups that serve the most basic human needs and that have always been the primary focus of charitable efforts.

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[16] Chief Judge Robinson and Judges Wald and Mikva did not participate in consideration of the rehearing petition (Pet. App. 81a).

The court of appeals nevertheless ruled that this historical limitation on the scope of the Campaign, codified by President Reagan in Executive Order No. 12,404, violates the First Amendment. In the view of the court of appeals, legal advocacy groups must be included in the Campaign, even though, unlike traditional health and welfare charities, advocacy groups are not universally regarded as furthering the public welfare in the most basic ways. Despite substantial evidence in the record that the recent court-ordered inclusion of legal advocacy groups has threatened the viability of the Campaign, disrupted the federal workplace, and created the appearance that federal resources are being used to further partisan causes, the court of appeals characterized the longstanding practice of excluding legal advocacy groups as "patently capricious and unreasonable" (Pet. App. 3a).

The ruling of the court of appeals finds no basis in this Court's First Amendment precedents; indeed, as the four judges who voted in favor of en banc consideration observed, the court's holding amounts to an unprecedented "transformation of the public forum doctrine in First Amendment analysis" (Pet. App. 82a). The decision of the court of appeals ultimately would force the President to restructure the Campaign quite substantially or, alternatively, to abolish the Campaign entirely. The First Amendment does not mandate a result so at odds with common sense.

A. The courts below approached this case as involving a First Amendment claim of equal access to government property for the purpose of engaging in a form of expressive activity, *i.e.*, charitable solicitation. But as this Court has made clear, the degree to which the First Amendment requires access to public property depends in part on the character of the property in question. *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 44 (1983). On the basis of its earlier decisions in this area, the Court in *Perry* identified three categories—the traditional public forum, the limited public forum, and the nonpublic forum.

This case clearly falls within the nonpublic forum category. The federal workplace is not an area that, by tradition or designation, has been used by the public for assembly and communication of ideas; rather, its purpose is to get the employer's work done. The Campaign itself has not converted the federal workplace into a public forum. Since the inception of the Campaign, federal officials have consistently limited participation to traditional health and welfare charities, thereby excluding other groups, such as legal defense funds. Moreover, the Campaign has been structured in a way that affords participating charities little opportunity to engage in expressive activity. The charities may not solicit federal employees directly; their only communication to employees consists of a 30-word descriptive statement that is subject to approval by federal officials. Thus, the Campaign has never even approached the status of a public forum.

B. Restrictions on access to nonpublic forums are consistent with the First Amendment if "the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46. The restriction at issue here is not based on the viewpoint of the excluded organizations; all groups other than traditional health and welfare charities are excluded from Campaign participation, regardless of their political or philosophical leanings. In addition, the President acted reasonably in continuing the limitation on Campaign participation to traditional health and welfare charities.

1. The distinction between traditional health and welfare charities and other types of organizations is reasonable in light of the purposes served by the Campaign and the federal workplace. There has long been a general understanding that it is appropriate for charitable drives in the workplace to focus on support for traditional charities. There is at least likely to be a greater consensus that the goals of such charities are worthwhile. Employers in the private sector and in state and local government commonly restrict on-the-job charitable solicita-

tion to traditional charities. Since there must be some limits on the scope of the Campaign, it seems entirely reasonable for the President to define eligibility in a way that has been accepted by other employers and that proved to be successful in practice over the first two decades of the Campaign.

2. Limitation of Campaign participation to traditional health and welfare charities also appears reasonable when examined in light of the objectives articulated in Executive Order No. 12,404: lessening the burden of government and local communities in meeting human health and welfare needs; minimizing disruption of the federal workplace and costs of fundraising; and avoiding the reality and appearance that federal resources are being used to advance partisan causes. The government clearly has an interest in encouraging private support for services that in turn will reduce the need for public funding of various social programs. It is not unreasonable for the President to conclude that that goal is more likely to be achieved as a result of contributions to charities that provide services directly to the needy and the sick.

Limiting Campaign participation to traditional health and welfare charities also helps to minimize disruption of the federal workplace, to reduce the costs of fundraising, and to maximize the success of the Campaign. The record in this case shows that the recent inclusion of a broader range of groups brought a widespread adverse reaction from federal employees, unions, local Campaign officials, and others. Some employees indicated that they would be unwilling to contribute to the Campaign so long as advocacy groups were included; and a number of federal employee unions sponsored boycotts of the Campaign or threatened future boycotts if the Campaign were not restored to its traditional scope. Particularly in view of this record evidence, the court of appeals' rejection of federal officials' predictions that inclusion of advocacy groups would impair the success of the Campaign is wholly inconsistent with the deference this Court has paid to such judgments in other nonpublic forum cases.

Moreover, the explicit exclusion of advocacy groups from the Campaign furthers the government's interest in avoiding the reality and appearance of using federal resources to advance the cause of political activity or advocacy of public policy positions. The court of appeals' suggestion that the tax exempt status of respondents ensures that inclusion of such groups will not threaten the government's interest in neutrality is simply inconsistent with both common sense and the record in this case.

3. Finally, the fact that alternative channels of solicitation, such as direct mailings to federal employees, are available to organizations that do not participate in the Campaign supports the conclusion that the eligibility criteria at issue here are reasonable.

4. The court of appeals' conclusion that limitation of the Campaign to traditional health and welfare charities is unreasonable resulted from its application of an inappropriately high level of scrutiny. The reasons offered by the court of appeals in support of its heightened scrutiny are simply insufficient to justify its departure from the deferential standard this Court has applied in nonpublic forum cases.

ARGUMENT

LIMITATION OF PARTICIPATION IN THE COMBINED FEDERAL CAMPAIGN TO TRADITIONAL HEALTH AND WELFARE CHARITIES IS CONSISTENT WITH THE FIRST AMENDMENT

This case involves a First Amendment challenge to the President's decision to limit participation in the Combined Federal Campaign to traditional health and welfare charities. The result of that decision is that other organizations, including legal defense funds and other advocacy groups, may not enjoy the benefit of contributions solicited from federal employees in the workplace.

There is no dispute that, since the inception of the Campaign under President Kennedy, participation has been limited to traditional health and welfare charities.[17]

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[17] The district court stated (Pet. App. 90a) that legal defense funds fell within the limits of the Campaign as it existed his-

Presumably the government could have chosen in 1961 to exclude charitable solicitation from the federal workplace altogether, so that all charities would have been confined to soliciting contributions from federal employees outside the workplace. Instead, President Kennedy determined that there should be a limited charitable fundraising program within the federal workplace, conducted by the federal government itself. The question here is whether the government, having established the Campaign and limited it to fundraising for the benefit of traditional health and welfare charities, is required by the Constitution to expand the Campaign to include fundraising for the benefit of other types of organizations.

The court of appeals determined that the historical limitation on Campaign participation is inconsistent with the First Amendment, at least to the extent that the Campaign fails to encompass fundraising for the benefit of legal advocacy groups. But that conclusion is not supported by either common sense or this Court's precedents. The four judges who voted in favor of en banc consideration correctly observed that the majority's holding rests on a "critical misinterpretation of First Amendment doctrine" (Pet. App. 83a).

Both the district court and the court of appeals viewed this case as involving a First Amendment claim of equal access to government property for the purpose of engaging in expressive activity. They purported to evaluate the limitation on Campaign participation in light of the

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torically, apparently because the 1961 executive order did not expressly differentiate among groups on the basis of how they achieve their objectives. However, the 1961 order referred to inclusion in the Campaign of "voluntary health and welfare agencies" and such other agencies "as may be appropriate" and delegated to the Chairman of the Civil Service Commission the responsibility of defining with greater precision the types of organizations that were "appropriate[ly]" included in the Campaign. See Exec. Order No. 10,927, § 2(a). Respondents have not challenged the proposition that the consistent administrative practice under the 1961 executive order was to exclude legal defense funds and other advocacy groups from the Campaign.

standards articulated in this Court's "forum" cases, in particular the analysis set forth in *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37 (1983). But a proper application of those standards leads to the conclusion that the limitation at issue here is entirely consistent with the First Amendment. We show below that this case is properly classified as involving a nonpublic forum, and is therefore subject to a less exacting level of First Amendment scrutiny. Limitation of the Campaign to traditional health and welfare charities satisfies the First Amendment because, as we explain, it is a reasonable restriction that is not based on the viewpoint of the excluded organizations.

A. This Case Involves A Nonpublic Forum

1. The Court in *Perry* made clear that the degree to which the First Amendment requires access to government property depends in part on the character of the property in question. 460 U.S. at 44. The Court surveyed the decisions in which it had considered claims of access to government property and concluded that they involved three broad categories—traditional public forums, limited public forums, and nonpublic forums. The demands of the First Amendment are most exacting in the case of a traditional public forum and least exacting in the case of a nonpublic forum.

"At one end of the spectrum," the Court in *Perry* identified traditional public forums—those "places which by long tradition or government fiat have been devoted to assembly and debate." 460 U.S. at 45. Parks and streets, for example, " 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions' " (*ibid.*, quoting *Hague* v. *CIO*, 307 U.S. 496, 515 (1939)). In these "quintessential public forums" the government may not prohibit all communicative activity. Content-based exclusions may be enforced only if they are necessary to serve a compelling state interest and are

narrowly drawn to achieve that end. 460 U.S. at 45. The government may also enforce reasonable time, place, and manner regulations that are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Ibid.*

The second, intermediate category of property described in *Perry* is the "limited public forum." The Court defined that category as public property that is not by tradition recognized as a public forum, but that the government, at least for the time being, "has opened for use by the public as a place for expressive activity" (460 U.S. at 45). Although the government has no constitutional obligation to maintain indefinitely the open character of the facility, "as long as it does so it is bound by the same standards as apply in a traditional public forum" (*id.* at 46). The Court suggested in *Perry* that university meeting facilities (*Widmar* v. *Vincent*, 454 U.S. 263 (1981)), school board meetings (*City of Madison Joint School District No. 8* v. *Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976)), and municipal theaters (*Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975)) fall within the description of "limited public forums." The Court pointed out that "[a] public forum may be created for a limited purpose such as use by certain groups, or for the discussion of certain subjects" (460 U.S. at 46 n.7; citations omitted).

The third category described by the *Perry* Court involves public property that is "not by tradition or designation a forum for public communication" (460 U.S. at 46). In addition to imposing time, place, and manner restrictions, the government may selectively deny access to such nonpublic forums in order to "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view" (*ibid.*). The Court classified the school mail facilities in *Perry* as a non-

public forum (*id.* at 46-48). The Court also included in this category postal mailboxes (*United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981)); prisons (*Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), and *Adderley* v. *Florida*, 385 U.S. 39 (1966)); military bases (*Greer* v. *Spock*, 424 U.S. 828 (1976)); and municipal transportation systems (*Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974)). See 460 U.S. at 46, 49 n.9.

Access distinctions based on subject matter and speaker identity, which may be impermissible in a public forum, are "[i]mplicit in the concept of the nonpublic forum" and are "inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." 460 U.S. at 49. A government facility does not become a public forum simply because it is used for communication of ideas, or because outside groups have been given selective access. *Id.* at 46-47; *Greer* v. *Spock*, 424 U.S. at 838 n.10; *Lehman* v. *City of Shaker Heights*, *supra*. Otherwise, as Justice Blackmun observed in writing for the plurality in *Lehman*, "display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." 418 U.S. at 304. Accord, *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 130 n.6.

2. This case clearly falls within the nonpublic forum category, rather than either of the public forum categories. Indeed, this case appears to be near the outer perimeter of the nonpublic forum category, at the opposite end of the spectrum from cases involving speech in streets and parks.

The government property, or "forum," involved in this case is the federal workplace.[18] Clearly the workplace is

[18] The courts below seemed to regard the Campaign as the relevant forum. But the Campaign itself does not constitute govern-

not a place that by tradition or designation has been used by the public for assembly and communication of ideas. Federal buildings generally are open only to those members of the public having business with the agency housed in that facility. See Pet. App. 51a. The federal workplace, like any place of employment, exists to get the employer's work done. Cf. *Connick* v. *Myers*, 461 U.S. 138, 150-151 (1983). In its capacity as an employer, the federal government has a strong interest in controlling activities in the workplace, including the Campaign. *Id.* at 150-154; *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968); *Ex parte Curtis*, 106 U.S. 371, 373 (1882). See also *Cafeteria & Restaurant Workers, Local 473* v. *McElroy*, 367 U.S. 886, 896 (1961) (noting the wide latitude afforded to the federal government in the "dispatch of its own internal affairs"). As Judge Starr observed, the federal workplace within which the Campaign takes place "bears little resemblance to a public street or park, * * * paradigms of the public forum;" its business is "to attend to the myriad interests and duties of government, not to provide a public forum for First Amendment communication" (Pet. App. 50a).

Despite the nonpublic nature of the federal workplace, the district court suggested (Pet. App. 90a) that the federal government, through the Campaign, has opened the workplace for the purpose of charitable solicitation,

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ment property; rather, it is an activity that takes place in the federal workplace. It is the workplace, and not the Campaign, to which respondents ultimately seek access. Compare, *e.g.*, *U.S. Southwest Africa/Namibia Trade & Cultural Council* v. *United States*, 708 F.2d 760, 764 (D.C. Cir. 1983).

Of course, it should make little difference whether it is the federal workplace or the Campaign itself that is viewed as the relevant forum. Both the majority and the dissent in the court of appeals recognized (Pet. App. 20a n.11, 48a-50a) that the Campaign must be examined in the context of the workplace where it is conducted. Thus, any analysis of restrictions on participation in the Campaign must take into account the government's interest in reserving the workplace for the purposes to which it is dedicated.

thereby creating a "limited public forum" to which legal defense funds have the same right of access as traditional charities. In the district court's view, the government, in sponsoring the Campaign, furnished "'a billboard or channel of communication through which organizations can disseminate their appeals to federal workers'" (*ibid.*, quoting *NAACP I*, 504 F. Supp. at 1367). That analysis might have some validity if the government had indiscriminately opened the Campaign for expressive activity by any group seeking to solicit funds from federal employees. See *City of Madison Joint School District No. 8* v. *Wisconsin Employment Relations Comm'n*, 429 U.S. at 174-175 & n.6. But that is not the case at all.

Neither the history nor the structure of the Campaign evidences any intent on the part of the federal government to allow the public unrestricted access to federal property to solicit funds from federal employees. The original impetus for establishing the Campaign was not any affirmative desire to provide an open forum for charitable solicitation in the federal workplace; rather, federal officials were concerned primarily with the disruption that had resulted from ad hoc solicitation activities. See pages 4-5, *supra*. The Campaign was instituted as a way of regulating charitable solicitation in the federal workplace, in order to minimize such disruption, while still affording federal employees a convenient channel for making charitable contributions.

Since its establishment, the Campaign has been the exclusive avenue for charitable solicitations in the federal workplace. And at least since 1961, the federal government's consistent practice has been, not to permit participation by any group that sought admission, but to limit the Campaign to traditional health and welfare charities. Other groups, including legal defense funds, have never been voluntarily admitted to the Campaign. See pages 6-7 & note 5, *supra*. See also *Combined Federal Campaign: Hearings Before the Subcomm. on the Civil Service of the House Comm. on Post Office and*

Civil Service, 96th Cong., 1st Sess. 20 (1979) (comments of Alan K. Campbell, Director, Office of Personnel Management).[19]

This Court has made clear that a nonpublic forum does not become a public forum, traditional or otherwise, simply because the government has provided certain groups with selective access to the facility. See *Perry*, 460 U.S. at 47 (prior grant of access to YMCA, Cub Scouts, and other civic and church organizations did not convert school mail system into a public forum). See also *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, *supra* (no First Amendment violation, although bulk mailing and meeting rights were extended to Jaycees, Alcoholics Anonymous, and the Boy Scouts, but not to prisoners' union); *Greer* v. *Spock*, 424 U.S. at 838 n.10 (fact that some civilian speakers and entertainers had been invited to Fort Dix did not convert it into a public forum); *Lehman* v. *City of Shaker Heights*, *supra* (rental of space for commercial advertising did not require city transit system to accept partisan political advertising). Thus, admission of traditional health and welfare charities to the Campaign during the 1960s and 1970s did not somehow transform the Campaign into a public forum that must now be held open to any group that wishes to enjoy its benefits.

Moreover, the amount of expressive activity by charities involved in the Campaign has always been quite minimal. The Campaign as a whole is unquestionably a federally sponsored enterprise. Participating charities

[19] Advocacy groups, including respondents and other legal defense funds, have participated in the Campaign since 1981 as a result of court decisions. They were included in 1981 and 1982 because the district court in *NAACP I* had struck down the earlier "direct services" standard for Campaign eligibility on vagueness grounds. See J.A. 53-59, 104-105. The advocacy groups were included in 1983 and 1984 as a result of the decisions below. See 48 Fed. Reg. 34910, 34913-34914 (1983); 49 Fed. Reg. 32735 (1984). As Judge Starr noted (Pet. App. 54a), this "is not a case of the government's trying to close the barn door after voluntarily allowing the horse to gallop away."

ultimately receive contributions made through the Campaign, but they do not themselves run the Campaign or engage in any direct solicitation of federal employees.[20] Federal officials direct the Campaign, and volunteer federal employees are responsible for solicitation of funds from their colleagues. See pages 10-11, *supra*. Participating charities may not send representatives into the workplace. 5 C.F.R. 950.507(a).

The only communication from a charity to federal employees that is permitted under the Campaign is a 30-word statement included in the contributors' leaflets distributed in the workplace by volunteer federal employees during the six-week period when the Campaign is conducted each year. This brief statement may only describe the charity's activities; it may not contain a particularized appeal for donations or use symbols that would compete for the attention of contributors. The 30-word statement is subject to approval by federal officials and may be edited by them if it does not conform to the regulatory requirements. 5 C.F.R. 950.521(a), (d) and (e).[21]

[20] A private organization, the principal combined fund organization (PCFO), may perform many of the administrative functions involved in a local Campaign. See pages 10-11, *supra*; Exec. Order No. 12,353, § 5. But in performing these functions the PCFO (normally a United Way affiliate) acts as an agent of the federal officials who direct the local Campaign. Although the PCFO may be responsible for printing Campaign materials, federal officials have ultimate control of the content of those materials. See page 11, *supra*. PCFO representatives do not conduct direct solicitation in the federal workplace.

The court of appeals pointed to statements in the executive orders governing the Campaign to the effect that charitable groups "solicit" funds from federal employees. See Pet. App. 14a. But this usage is simply a shorthand reference to inclusion of charities as Campaign beneficiaries. Nothing in the record suggests that the charities themselves have ever been permitted to enter the workplace in order to solicit funds directly from federal employees since the Campaign was established.

[21] OPM advises us that federal officials often approve the draft descriptive statements as submitted by the participating charities.

This form of indirect and severely restricted communication is, of course, quite different from the sort of charitable solicitation activity that this Court has characterized as expression protected by the First Amendment. The latter is "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues." *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). See also *Secretary of State* v. *Joseph H. Munson Co.*, No. 82-766 (June 26, 1984); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Unlike the activities considered in those cases—door-to-door solicitation, fundraising events apparently directed to the public in general, and face-to-face solicitation at a state fair—the Campaign by definition rules out face-to-face contacts, persuasive speech, or even any communication of information beyond a brief, neutral description of a charity's activities.

The restrictions that have always existed in connection with the Campaign make it a context in which the First Amendment interests of groups that wish to participate are decidedly weak; indeed, the primary advantage such groups would gain from participation is not a platform for expressive activity, but rather the benefit of a collection mechanism that would enable them to reduce their own fundraising expenditures. Cf. *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983). Thus, to the extent this case can be said to involve a "forum" at all (see Pet. 14 n.14), it does not present the characteristics of a forum that the government "has opened for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 45. See also *Minnesota State Board for Community Colleges* v. *Knight*, No. 82-898 (Feb. 21, 1984), slip op. 9. In fact, the Campaign and the workplace in which it is conducted seem considerably further removed from the public forum category than, *e.g.*, the mailboxes in *Perry* or the military base in *Greer* v. *Spock*. Accordingly, the case clearly

falls into the nonpublic forum category and is, we submit, near the edge of the spectrum described by this Court's "forum" cases.[22]

B. Limiting Participation In The Campaign To Traditional Health And Welfare Charities Is Reasonable And Is Therefore Consistent With The First Amendment

The President's decision to continue the longstanding policy of restricting Campaign participation to traditional health and welfare charities is entirely consistent with the First Amendment. Since this case involves a

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[22] We note that all of the cases this Court has identified as involving nonpublic forums have entailed considerably more expressive activity than is at issue here. Several of those cases involved property that was specifically dedicated to communicative activity, *i.e.*, mailboxes or advertising space. See *Perry*, *supra*; *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, *supra*; *Lehman* v. *City of Shaker Heights*, *supra*. Other nonpublic forum cases have considered activities that are clearly expressive in nature. See, *e.g.*, *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, *supra* (union activities); *Greer* v. *Spock*, *supra* (leafleting, political rallies); *Adderley* v. *Florida*, 385 U.S. 39 (1966) (civil rights demonstration). As we pointed out in the text, neither the property at issue here nor the "activity" in which respondents seek to engage involves a significant amount of expression.

Indeed, some aspects of the Campaign, such as the payroll deduction feature, do not appear to implicate any First Amendment interest at all. In *City of Charlotte* v. *Local 660, International Ass'n of Firefighters*, 426 U.S. 283 (1976), the Court held that a city did not violate equal protection in refusing to withhold union dues from employee paychecks, while permitting payroll deductions for certain other purposes (including contributions to the United Way). The Court did not even suggest that such a policy might be the subject of a First Amendment claim.

Of course, even if this case were not subject to First Amendment "forum" analysis, restrictions on Campaign participation would still be subject to an inquiry into whether the distinctions the President has drawn violate the right to equal protection of the laws. Cf. *Regan* v. *Taxation With Representation*, *supra*. Under either equal protection analysis or nonpublic forum analysis, the basic inquiry is addressed to the reasonableness of the line established by the government. See page 46 note 37, *infra*.

nonpublic forum, there is no inherent constitutional infirmity in the decision to exclude some groups from participation in the Campaign. As this Court noted in *Perry*, "the right to make distinctions in access on the basis of subject matter and speaker identity" is "[i]mplicit in the concept of the nonpublic forum" (460 U.S. at 49). Although such distinctions may be impermissible in a public forum, they are "inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property" (*ibid.*).

This Court in *Perry* articulated the standard for evaluating restrictions on access to nonpublic forums. Such restrictions are consistent with the First Amendment if "the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." 460 U.S. at 46. It is clear that the limitation of Campaign participation to traditional health and welfare charities is not based on opposition by federal officials to the views of the groups that are thereby excluded. For example, all advocacy groups are ineligible to participate, regardless of their political or philosophical leanings; the excluded groups include, *e.g.*, the Conservative Legal Defense and Education Fund, respondent NAACP Legal Defense and Educational Fund, Inc., the National Right to Work Legal Defense Foundation, and various environmental groups.[22]

[22] This Court has held that restrictions that "are not aimed at particular parties, groups, or points of view" are properly regarded as viewpoint-neutral. See *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973); see also *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion). Neither the district court nor the court of appeals made any finding that respondents were excluded from the Campaign because of official opposition to their views.

Respondents suggested below that Executive Order No. 12,404 is not viewpoint-neutral because it discriminates against groups that advocate use of litigation to achieve their goals. But it is the goals of the groups that constitute their viewpoints for purposes of First Amendment analysis, not their use of litigation. Judge Starr correctly noted (Pet. App. 71a) that litigation is properly regarded not as a viewpoint, but merely as a means of promoting a viewpoint.

And, of course, it is not only legal defense funds that are ineligible to participate in the Campaign. Universities, churches, opera guilds, animal welfare groups, and a host of additional organizations also are excluded from participation under the executive order.

The constitutionality of limiting the Campaign to traditional health and welfare charities therefore turns on the other prong of the test articulated in *Perry*—whether the regulation on speech is reasonable. The reasonableness of restrictions on Campaign participation must be evaluated in light of the purposes served by the Campaign and the federal workplace. Analysis of those purposes leaves little doubt that the President acted rationally in restoring the limitation on Campaign participation to traditional health and welfare charities.

1. *Limiting Participation To Traditional Health And Welfare Charities Is Reasonable In Light Of The Common Understanding Of The Purposes Of Charitable Drives Conducted In The Workplace*

There has long been a general understanding that it is appropriate for charitable drives conducted in the workplace to focus on support for traditional charities, particularly those that provide basic health and welfare services to the needy. The distinction between such traditional charities and other types of organizations is obviously one that seemed natural to President Kennedy and to the federal officials who implemented his 1961 executive order for 20 years. It is a distinction that is not at all illogical or difficult to grasp. This Court itself has recently recognized that there are differences between these two types of groups. See *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. at 635 (distinguishing between charitable organizations

whose "primary purpose is * * * to provide money or services for the poor, the needy or other worthy objects of charity" and those that "gather and disseminate information about and advocate positions on matters of public concern").[24]

The longstanding acceptance of such a distinction is not surprising. Most people would perceive a meaningful difference between traditional charities that render services directly to the needy or the sick (*e.g.*, the American Red Cross, the National Spinal Cord Injury Association, and the Juvenile Diabetes Foundation), on the one hand, and, *e.g.*, legal defense funds and other advocacy groups that render services on the basis of compatibility with a cause and that, at best, provide only indirect benefits to the needy and the sick, on the other. There is at least likely to be a greater consensus that the goals of the former are worthwhile. Thus, limitation of Campaign participation to traditional charities is likely to contribute significantly to acceptance of the Campaign by federal employees and to the ultimate success of the Campaign.

The widespread practice of employers in the private sector and in state and local government confirms the inherent reasonableness of the distinction betwen traditional health and welfare charities and other types of organizations in the context of the Campaign. As Judge Starr noted (Pet. App. 51a-52a), private employers commonly limit on-the-job charitable solicitation drives to traditional health and welfare charities, often those affiliated with the United Way. See *e.g.*, *Serv-Air, Inc.* v. *NLRB*, 395 F.2d 557, 560 (10th Cir.), cert. denied, 393 U.S. 840 (1968); *Moye* v. *Chrysler Corp.*, 465 F. Supp. 1189 (E.D. Mo.), aff'd mem., 615 F.2d 1365 (8th Cir.

[24] In *Village of Schaumburg* the Court concluded that such distinctions were not sufficient to justify a prohibition on door-to-door solicitation that would affect advocacy groups but not most traditional charities. However, as the Court noted in *Perry*, distinctions that are not permissible in a public forum may be found reasonable when applied to a nonpublic forum. See 460 U.S. at 49.

1979); *Hammary Manufacturing Corp.*, 258 N.L.R.B. 1319, 1320 (1981), modified, 265 N.L.R.B. 57 (1982); Note, *United Charities and the Sherman Act*, 91 Yale L.J. 1593, 1593 n.2 (1982) (noting that local chapters of the United Way of America enjoy exclusive access to almost 90% of the workplaces in which they solicit); Rose-Ackerman, *United Charities: An Economic Analysis*, 28 Pub. Pol'y 323, 340 n.34 (1980) (few employers have open-ended charity drives that include all tax-exempt organizations). The same is true of most state and local governments. See, *e.g.*, *City of Charlotte* v. *Local 660, International Ass'n of Firefighters*, 426 U.S. 283, 287 n.3 (1976); *Black United Fund of New Jersey, Inc.* v. *Kean*, 593 F. Supp. 1567 (D.N.J. 1984); *International Service Agencies* v. *United Way of New York State*, 108 Misc.2d 305, 437 N.Y.S.2d 533 (Sup. Ct. 1981).[25]

The United Way and similar federated charities, which play such a prominent part in workplace charitable drives, have consistently limited their membership to traditional health and welfare charities and have excluded other groups, such as advocacy groups like respondents. See *Executive Orders 12353 and 12404 as They Regulate the Combined Federal Campaign*, *supra*, at 249 (statement of Jack Moskowitz, Senior Vice President, Federal Government Relations, United Way of America); United Way of America, *1983 Annual Report* 29 (listing health and social services providers that receive United Way funds); Rose-Ackerman, *supra*, at 337-338. Indeed, federated charities, like the federal government in this case, take the position that limitation of their memberships to health and welfare groups, which have broad support from potential donors, is essential to the success of their

[25] The United Way and its predecessors (*e.g.*, community chest groups) owe much of their success to strong support from private and public employers. See C. Bakal, *Charity U.S.A.* 407-408 (1979); United Way of America, *1983 Annual Report* 27 (approximately 50% of United Way support in 1982 came from employees in the private sector; another 11% came from employees in the nonprofit and government sectors).

efforts. See, *e.g.*, *United Charities and the Sherman Act*, *supra*, at 1595 & n.11.

We do not suggest that the practices of public officials are necessarily constitutional simply because they are consistent with the practices of other employers. Unlike the government, private employers and groups like the United Way are not subject to the demands of the First Amendment. But the practices of other employers are clearly relevant to the question whether the government has met the standard of reasonableness applicable to restrictions on access to a nonpublic forum. The fact that private employers and United Way groups have distinguished between traditional health and welfare charities and other types of organizations for purposes of fundraising drives in the workplace strongly suggests that it is rational for the federal government, acting in its capacity as employer, to make a similar distinction for purposes of the Campaign.

It also is important to emphasize that, like most charity drives conducted in the workplace, the Campaign is not regarded simply as a clearinghouse for collection of employee contributions by any interested organization. Instead, it represents an effort to direct the maximum benefit to the class of groups that are generally perceived as serving the most basic human needs. The federal government itself sponsors the Campaign and actively encourages employees to contribute to it. That sponsorship role makes it particularly reasonable that the government should be able to define the scope of the Campaign in a generally accepted manner. Even the court of appeals recognized (Pet. App. 35a) that it may be necessary for the government to draw a line somewhere in order to confine the Campaign to a manageable scope. In view of the need to draw such a line, it seems entirely sensible for the President to choose to define eligibility in the manner that has gained acceptance among other employers and that proved successful in practice during the 20 years following initiation of the Campaign.

2. *Limiting Participation To Traditional Health And Welfare Charities Is Reasonable In Light Of The Purposes Set Out In Executive Order No. 12,404*

Limitation of Campaign participation to traditional health and welfare charities also appears reasonable when examined in light of the purposes articulated in Executive Order No. 12,404. Section 1(b) of the executive order sets out those purposes: lessening the burden of government and local communities in meeting human health and welfare needs; minimizing disruption of the federal workplace and costs of fundraising, while still offering federal employees a convenient channel for their charitable donations; and avoiding both the reality and appearance that federal resources are being used to advance political activity or advocacy of public policy, lobbying, or philanthropy that does not directly serve needs of human health and welfare.

a. There can be little question that the federal government has a significant interest in reducing the level of public funding required for various social programs (*e.g.*, food stamps and Medicaid) by maximizing the amount of private support for such services. In furtherance of that interest, it is surely reasonable for the government to make it more convenient for federal employees to contribute to organizations, like the American Red Cross or the American Cancer Society, that directly serve the needy and the sick, while leaving other types of groups to raise funds from federal employees outside the federal workplace. See *Regan* v. *Taxation With Representation*, 461 U.S. at 548-551; *Harris* v. *McRae*, 448 U.S. 297, 316-318 (1980).

The court of appeals appears to have accepted the proposition that the government has a legitimate interest in maximizing the level of contributions to organizations that provide health and welfare services directly to the needy and the sick. The court nevertheless termed "patently ludicrous" the President's use of this consideration as a basis for limiting the scope of the Campaign

(Pet. App. 24a). In the court's view, the efforts of respondents and other advocacy groups benefit the needy and society in general as much as the efforts of the traditional groups. But surely the President may rationally conclude, in Judge Starr's words, that "in general a dollar given to a traditional health and welfare charity will more certainly aid the needy than a dollar given to an advocacy group" (Pet. App. 67a n.39). Cf. *Regan* v. *Taxation With Representation*, 461 U.S. at 548-549, 550-551; *Buckley* v. *Valeo*, 424 U.S. 1, 98 (1976). Since litigation is a risky business, the efforts of a legal defense fund to compel others to expend funds for, or provide services to, the needy may or may not produce the desired result. Traditional health and welfare charities, in contrast, do not rely on intervention by the courts to produce the desired benefits.[26]

b. Limiting Campaign participation to traditional health and welfare charities also helps to minimize disruption of the federal workplace, to reduce the costs of fundraising, and to maximize the success of the Campaign. One of the primary purposes of instituting the Campaign in the first place was to minimize the disruption caused by the absence of government-wide regulation of fundraising in the federal workplace, while providing a convenient channel for employee contributions. See pages 4-5, *supra*. Common sense suggests that these objectives would be best served by focusing Campaign efforts on groups that are universally recognized as providing particularly worthwhile services that address the most basic human needs and by excluding groups whose primary focus is on advocacy activities.[27] Even if the reasonableness of such a

[26] Moreover, the efforts of one legal defense fund might well be neutralized by those of another fund that supports an opposing view of where the public interest lies, so that no net "benefit" would result from either group's activities. Contributions to traditional health and welfare charities, on the other hand, are likely to produce at least some net benefit to the intended recipients of the services.

[27] Advocacy activities are by their nature likely to engender controversy, since they involve the promotion of one of several opposing positions. For example, those litigating in support of a particular cause normally direct their efforts against those who have different views on the merits of that cause. As Judge Starr noted (Pet. App. 62a-63a n.23; emphasis omitted), organizations that espouse or oppose policies "like affirmative action or the closed shop are controversial, for the plain reason that the arguments for and against such policies are controvertible in a way that arguments in favor of a policy of seeking a cure for cancer are not."

judgment were not intuitively obvious, it is confirmed by the government's recent experience with the Campaign.

Following the 1981 decision in *NAACP I* (see page 7, *supra*), which invalidated the "direct services" formulation of Campaign eligibility on the ground of vagueness, federal officials concluded that they were required to include advocacy groups in the Campaign, at least until they were able to promulgate more precise eligibility standards. See pages 7-8, *supra*. That temporary expansion of the scope of the Campaign brought a widespread adverse reaction that appeared to threaten the future of the Campaign. As Judge Starr noted (Pet. App. 63a (footnote omitted)), "inclusion of the advocacy groups caused both specific losses in the 1983 campaign and threatened the success of the charitable campaign in the years to come."[28]

The record contains numerous letters in which employees, union officials, and local Campaign officials protested (some in quite vehement terms) the inclusion of advocacy groups in the 1983 Campaign (held in the fall of 1982, see note 28, *supra*). Some employees indicated that they would not be willing to contribute to the Campaign unless it were returned to its traditional scope. See J.A. 275-276, 277-280, 286, 289, 303-304, 348-349, 357, 392. Some federal employee unions urged employees to

[28] Judge Starr was referring to the Campaign held in the fall of 1982. See Pet. App. 63a. As Judge Starr noted (*ibid.*), federal employees are solicited in the fall of the year for a pledge of contributions that will be deducted from their paychecks the following year. Thus, the Campaign held in the fall of 1984 is referred to as the 1985 Campaign. This usage has created some confusion, with the result that references in the record are sometimes inconsistent.

boycott the 1983 Campaign because of the inclusion of the National Right to Work Legal Defense Foundation. At least one union, the International Association of Machinists and Aerospace Workers, boycotted the Campaign on a nationwide basis. See *id.* at 88-90. Local boycotts also reduced contributions in some parts of the country. See, *e.g.*, *id.* at 25, 36-38, 44, 280, 311, 354, 360-361, 366, 372, 375, 378.[29] See also *id.* at 23-24, 34, 91- 93, 350, 356, 360, 364-365, 368, 370, 377. In some cases, federal officials were able to forestall boycotts only by representing that the Campaign would return to its traditional scope in the future. See *id.* at 40-42, 374. Local Campaign officials urged a return to the traditional limitation on participation because of the adverse effects of inclusion of the advocacy groups. See *id.* at 40-43, 278-280, 287-288, 297-302, 346-349, 351-355, 357-358, 363, 367-371, 374-380, 389, 393. In addition, Members of Congress wrote on behalf of their constituents to protest inclusion of the new groups. See *id.* at 281-283, 293-296; *Executive Orders 12358 and 12404 As They Regulate the Combined Federal Campaign: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 98th Cong., 1st Sess. Pt. 1, at 103-171 (1983). Traditional health and welfare charities reported that inclusion of the advocacy groups had interfered with the success of the Campaign, which in turn resulted in a reduction of the support on which the traditional groups depended. *Id.* at 359, 381-388.

While nationwide contributions to the 1983 Campaign generally kept pace with inflation, the increase in the level of donations was smaller than in previous years, and the percentage of federal employees contributing to the Campaign declined. Pet. App. 63a, 65a; J.A. 430.[30]

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[29] For example, at the St. Louis, Missouri office of the Defense Mapping Agency, pressure groups picketed and distributed leaflets urging federal employees not to contribute to the Campaign. J.A. 352-353.

[30] Sidney M. Ford, Chairman of the Federal Executive Board of Greater St. Louis, citing the adverse consequences of inclusion of advocacy groups in the fall of 1982, described the probable consequences for the future of the Campaign (J.A. 370-371; Pet. App. 75a-76a):

> There is a growing concern on the part of Federal officials that if the CFC does not remove many of the controversial organizations, dire results will occur. Many people are looking for a chink in the CFC armor, and it appears that by including advocacy groups we play into their hands; and we provide the "I'll give at home" individual the excuse for not participating.

Moreover, the record indicates that the ability of the 1983 Campaign to maintain past levels of support was due in large measure to investments of extraordinary time and effort by those involved in the Campaign.[31] Of course, since Campaign solicitations occur "during duty hours" (5 C.F.R. 950.103(e)), each extra hour spent on fundraising is an hour not spent on the employee's regular duties.

Although it seems self-evident that the government has an interest in avoiding disruption of the federal workplace and ensuring the success of the Campaign, the court of appeals found it "extremely disturbing" that federal officials might choose to structure the Campaign in a manner that would minimize employee protest (Pet. App. 28a). Despite the record evidence described above, the court found "no plausible reason to suspect that the lim-

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[31] For example, the chairman of the Dallas-Fort Worth Federal Executive Board reported that the 1983 Campaign succeeded in the Dallas-Forth Worth area "because we devoted additional time and efforts * * * to explain to our employees the change taking place regarding the admission of nonhealth and welfare organizations," but that "[w]e cannot devote the additional time of our staff to further sell the CFC without detracting from our Agency mission" (J.A. 40). See also *id.* at 278, 354, 368, 378.

The experience of the 1983 Campaign suggests that expansion of the Campaign beyond its traditional scope tends to create morale problems and to divert some federal employees from their normal duties. The court of appeals' suggestion (Pet. App. 32a) that the government may discipline federal employees who engage in Campaign-related disruption that impairs efficiency misses the point. The government's interest lies in *avoiding* situations that give rise to the need for discipline.

ited and unobtrusive communications at issue will in any way interfere with the normal activities in the workplace" (*id.* at 32a). It declined to defer to what it referred to as "the fanciful—and somewhat specious—speculations" of the government on this subject (*ibid.*). The court further stated that it was unpersuaded by the government's contention that inclusion of legal advocacy groups would threaten the fundraising purposes of the Campaign (*id.* at 33a).

In summarily rejecting federal officials' concern with disruption of the workplace and the success of the Campaign, the court of appeals disregarded this Court's consistent recognition that the government has a legitimate interest in excluding from a nonpublic forum particularly controversial expressive activity that may threaten the success of some governmental venture. In *Perry* itself, the Court found it relevant that exclusion of a rival union from a school mail system would help to preserve labor peace within the schools (460 U.S. at 52). And in *Lehman* v. *City of Shaker Heights*, the Court recognized (418 U.S. at 304) that exclusion from mass transit vehicles of political advertising that might offend some patrons was justified in part because it would avoid jeopardizing revenues to the city. See also *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 129; *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 132-133.[32]

[32] The court of appeals observed that a decision to exclude certain types of groups in part because their inclusion would be likely to provoke controversy among federal employees would be inconsistent with this Court's First Amendment precedents. See Pet. App. 28a-30a. However, the cases it cited in support of that proposition do not concern nonpublic forums.

More important, the court of appeals appears to have believed that the government was asserting the right to exclude individual groups from the Campaign in response to objections from federal employees. See, *e.g.*, Pet. App. 30a. We do not make any such claim. Instead, we contend that in determining what restrictions should be placed on access to a nonpublic forum, it is entirely appropriate for government officials to consider whether certain

Furthermore, the court of appeals should not have second-guessed the judgment of federal officials that expansion of the traditional scope of the Campaign was likely to lead to disruption and to interfere with the success of the Campaign. As we discussed above, the record in this case fully supports the predictions of federal officials on this score. Even if there were no such record evidence, this Court has made it clear that in nonpublic forum cases government officials are not required to produce empirical proof in support of their predictions about the likely effect of controversial speech. *Perry*, 460 U.S. at 52 n.12 (citing *Greer* v. *Spock*, *supra*); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 127-128 n.5. Federal officials need not await the disruption of the workplace or the destruction of the Campaign before taking remedial action. See *Connick* v. *Myers*, 461 U.S. at 152.[33]

c. The third objective articulated in Executive Order No. 12,404—avoiding the reality and appearance of using federal resources to advance the cause of political activity or advocacy of public policy—is also a legitimate ground for exclusion of advocacy groups from the Campaign. This Court has recognized in the Hatch Act cases that the federal government has a strong interest in preserving neutrality and the appearance of neutrality in the federal

classes of groups—which can be distinguished on a basis other than the fact that they share a particular viewpoint—are more likely to provoke controversy than others and to threaten the success of the common venture.

[33] The court of appeals took the position that inclusion of advocacy groups would not threaten the viability of the Campaign because "providing employees a broad range of groups to choose among may encourage, rather than discourage, employee contributions" (Pet. App. 33a). Of course, it is always possible that the court of appeals' prediction, rather than that of federal officials, would turn out to be correct. But federal officials have made a reasoned judgment, based on firsthand observation of the experience of several Campaigns in which advocacy groups participated, that inclusion of those groups is more likely to harm the success of the Campaign in the long run.

workplace. See *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 564-565 (1973). And in *Greer* v. *Spock*, 424 U.S. at 839, and *Lehman* v. *City of Shaker Heights*, 418 U.S. at 304, the Court concluded that the government's desire to avoid "lurking doubts" (*ibid.*) of favoritism or entanglement with partisan political activity would justify restrictions on expressive activities in nonpublic forums. The policy of official neutrality with respect to political controversies or policy disputes, which the Court in *Greer* said the military authorities at Fort Dix "were constitutionally free to pursue" (424 U.S. at 839), is equally applicable in the civilian workplace. See *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. at 564-565.

The court of appeals agreed that the government has a legitimate interest in avoiding the fact or appearance of supporting advocacy groups; however, it disagreed with the President's judgment that the exclusion of respondents and other legal defense funds would advance that interest (Pet. App. 25a).[34] In the court's view, respondents' tax exempt status indicated that they were not engaged in "political advocacy" (*id.* at 25a-26a). But tax exempt status under the Internal Revenue Code serves purposes that are different from the concerns that underlie limitations on Campaign participation. The Internal Revenue Code bars tax exempt organizations from participating or intervening in "any political campaign on behalf of any candidate for public office," or devoting a "substantial part" of their activities to "carrying on propaganda,

[34] The district court suggested (Pet. App. 94a) that the government interest in neutrality could be served by insertion of disclaimers in Campaign materials. This Court has declined to adopt such reasoning in at least one other nonpublic forum case. See *Lehman* v. *City of Shaker Heights*, 418 U.S. at 321-322 (Brennan, J., dissenting). But cf. *FCC* v. *League of Women Voters*, No. 82-912 (July 2, 1984), slip op. 29-30. And, of course, any such disclaimer presumably would be seen only by federal employees, not by those outside the federal workplace.

or otherwise attempting, to influence legislation." 26 U.S.C. 501(c)(3).[35] In limiting participation in the Campaign, however, federal officials are concerned not merely with avoiding government sponsorship of electoral politics; they also seek to preserve government neutrality among groups with competing public policy views. Cf. *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 745-746 (1978) (opinion of Stevens, J.).

More to the point, the perception that inclusion in the Campaign of a group like the National Right to Work Legal Defense Foundation is motivated by politics will not be dispelled merely by the fact that the organization qualifies for tax exemption under the Internal Revenue Code. As a matter of common sense, inclusion of a right to work organization or any other advocacy group is unlikely to be perceived as a neutral act in view of the government's active sponsorship of the Campaign as a whole. See page 34, *supra*. The record in this case further supports the President's judgment on this score. For example, the AFL-CIO advised its members, in response to the inclusion in the Campaign of the right to work group: "The Reagan Administration has granted yet another opportunity to the far right wing to enrich itself, this time at the expense of federal and postal employees and the needy" (J.A. 92). The President of the International Association of Machinists and Aerospace Workers, which traditionally had supported the Campaign, urged members to withhold support from the 1983 Campaign because, by including the right to work group, "Reagan's appointees have perverted every accepted concept of charity and compassion" (*id.* at 88). Particularly in view of such record evidence, the court of appeals' failure

[35] The regulations governing eligibility for the Campaign refer to tax exempt status as one criterion for eligibility (see 5 C.F.R. 950.101(a)(1)(iii)), but that is only a threshold screening device. Other criteria narrow the eligibility definition further so that it encompasses only the health and welfare charities traditionally included in the Campaign. See 5 C.F.R. 950.101, 950.401 *et seq.*

to defer to the judgment of the President on this matter is wholly unjustified.[36]

3. *Limiting Participation To Traditional Health And Welfare Charities Is Reasonable In Light Of The Availability Of Alternative Channels Of Communication*

The concerns described above, individually and in combination, provide ample support for the conclusion that limitation of Campaign participation to traditional health and welfare charities is reasonable. That conclusion is reinforced by the fact that alternative channels of communication are available to organizations that are not eligible to participate in the Campaign. Nothing in Executive Order No. 12,404 prohibits respondents or other advocacy groups from soliciting contributions directly from federal workers outside the workplace; and, of course, the executive order does not prohibit federal employees from responding to such solicitations. See 5 C.F.R. 950.103(f). Alternative avenues for solicitation of federal employees would include techniques used to attract contributions from other members of the public, *e.g.*, direct mailings, telephone contact, door-to-door solicitation, fundraising rallies or dinners, and media advertisements. The Campaign is undoubtedly a more convenient and less costly method of obtaining contributions than most of these alternatives. But the First Amendment does not require the government to subsidize charitable solicitation. See *Regan* v. *Taxation With Representation*, 461 U.S. at 545-546.

The court of appeals asserted, without citation of authority, that "the availability of alternative forums has never been considered to justify Government attempts to

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[36] The court of appeals' failure to accord deference to the President's judgment is especially inappropriate in view of the posture of this case. Since the case was decided on respondents' motion for summary judgment, evidence relating to the reasonableness of restrictions on Campaign participation should be viewed in the light most favorable to the government.

'pick and choose' among preferred speakers" (Pet. App. 36a). But this Court has made clear that the availability of such alternatives *is* relevant to determination of the reasonableness of a restriction on expression in a nonpublic forum. In *Perry* the Court concluded that limitations on a union's access to the school mail system were reasonable in part because of "the substantial alternative channels that remain open for union-teacher communication to take place," including bulletin boards, meeting facilities, and the United States mail. 460 U.S. at 53. And in *Greer* v. *Spock*, 424 U.S. at 839, the Court found it significant in evaluating restrictions on on-base expressive activities that servicemen were free to attend political rallies off base. See also *Pell* v. *Procunier*, 417 U.S. 817, 827-828 (1974) (noting that prison inmates could communicate with the media by mail and through visitors).

4. *The Court Of Appeals' Conclusion That Limiting The Campaign To Traditional Health And Welfare Charities Is Unreasonable Resulted From Application Of An Inappropriately High Level Of Scrutiny*

The court of appeals' rejection of the President's distinction between traditional health and welfare charities, on the one hand, and advocacy groups, on the other, appears to be due in part to its application of an unduly exacting standard of scrutiny. The extent of the court of appeals' departure from this Court's nonpublic forum precedents is confirmed by the sharp distinction it drew between what it viewed as the proper standard and what it termed the "rational basis" test applied by the dissent (see Pet. App. 38a).

We are puzzled by the distinction the court of appeals purported to draw between the "reasonableness" standard applicable to restrictions on access to nonpublic forums under *Perry* and a "rational basis" test. Normally these two terms are used interchangeably, at least in this context. See *e.g.*, *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 134-136; *City of Charlotte* v.

Local 660, International Ass'n of Firefighters, 426 U.S. at 286-289. In determining whether a restriction on access to a nonpublic forum is reasonable, the Court generally has looked to whether there was a rational basis for the restriction.[27] Moreover, as Judge Starr recognized (Pet. App. 44a, 56a-59a), it is clear that this Court, in undertaking the "reasonableness" inquiry, has accorded considerable deference to the judgments of government officials concerning the need for restrictions on access to a nonpublic forum. The Court has declined to require public officials to demonstrate that the government has a significant interest in excluding a particular group from a nonpublic forum. See, *e.g.*, *Perry*, *supra* (one union's status as exclusive bargaining representative was sufficient to justify exclusion of rival union from access to school mail facilities). See also Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 Stan. L. Rev. 121, 127-131 (1982); Cass, *First Amendment Access to Government Facilities*, 65 Va. L. Rev. 1287, 1303 (1979). The Court has never suggested that it would require government officials to show more than a rational basis for their judgments restricting access to a nonpublic forum.

The court of appeals justified its heightened scrutiny in part on the basis of its finding that respondents were

[27] In *Perry* the Court noted that the school district's policy of restricting access to the interschool mail system "need only rationally further a legitimate state purpose" (460 U.S. at 54). And in *Jones* v. *North Carolina Prisoners' Labor Union, Inc.* the Court stated (433 U.S. at 134):

> A prison may be no more easily converted into a public forum than a military base. Thus appellants need only demonstrate a rational basis for their distinctions between organizational groups.

These statements were made in the context of discussions of equal protection challenges to the access restrictions at issue in *Perry* and *Jones*. But the Court did not suggest in either case that the applicable equal protection standard was significantly different from the standard it applied in rejecting the First Amendment challenge also presented in each case.

similarly situated to organizations that had been found eligible to participate in the Campaign.[28] The court of appeals noted (Pet. App. 20a-21a) that in *Perry* this Court concluded that exclusion of one union from access to the interschool mail system was reasonable in part because there was a difference in the status of two rival unions, *i.e.*, the union that was given access had been chosen as the exclusive bargaining representative of the teachers employed by the school district. The court of appeals here found it equally significant that both respondents and the organizations that participate in the Campaign qualify for tax exempt status under Section 501(c)(3) of the Internal Revenue Code. But as Judge Starr noted (Pet. App. 59a), this Court has not generally insisted that groups excluded from a nonpublic forum have a "status" different from that of those admitted to the forum. The difference in legal status presumably was significant in *Perry* because the two unions were alike in other respects. In this case, however, the President has not attempted, *e.g.*, to treat one emergency relief charity differently from another; rather, he has distinguished between two types of groups that differ in fundamental respects, apart from their legal status. See pages 31-37, *supra*.

In any event, the court of appeals erred in concluding that respondents' tax status would rebut any justification for excluding them from the Campaign. Organiza-

[28] The court of appeals also appears to have concluded that strict scrutiny was appropriate because of what it perceived as the "vacillat[ing]" official explanations for the restriction (Pet. App. 24a; see also *id.* at 42a). Much of the "vacillation" the court perceived amounts merely to differences in emphasis depending on the particular context in which petitioner was speaking at different times. Of course, it is not surprising that federal officials would discuss a variety of theories and formulations in the course of developing proposals for executive action. It is the President who ultimately decided to issue Executive Order No. 12,404, not petitioner. The executive order itself, rather than any preliminary statements by administrators, is the most authoritative statement of the President's reasons for deciding to return the Campaign to its original scope.

tions that qualify for tax exempt status are by no means uniform in terms of the services they perform. And as we explained above (see pages 42-43, *supra*), although tax exempt status shows that a group does not devote extensive resources to electoral politics and lobbying, it does not bar the group from engaging in other advocacy activities.[39]

The court of appeals also questioned the distinction drawn by the President because, in the court's view, respondents' efforts were more likely to result in health and welfare services to the needy than the activities of some of the groups OPM had declared eligible for Campaign participation in the fall of 1982. Pet. App. 22a. The court noted in particular the inclusion of the National

[39] The court of appeals' focus on tax exempt status suggests that any tax exempt organization, presumably including churches, schools, and a variety of other groups, could claim a constitutional right to be included in the Campaign. The 1983 Annual Report of the Commissioner and the Chief Counsel for the Internal Revenue Service 64, Table 20, states that over 300,000 organizations are listed as tax exempt under 26 U.S.C. 501(c)(3). (This figure does not include churches, which need not apply for an exemption.) Inclusion of all such organizations in the Campaign would result in a substantial administrative burden on the government and would require administrative changes that would be likely to evoke strong protests from both federal employees and participating groups (as has been the experience of the Campaign held during the fall of 1984, see Washington Post, Sept. 20, 1984, at A17, col. 3). Moreover, such an expansion would change the nature of the Campaign significantly. Rather than itself determining the focus of the charitable drive it sponsors, the federal government would act merely as a publicity and collection agent for all tax exempt organizations.

The court of appeals rejected the government's contention that it was reasonable to restrict the Campaign to traditional health and welfare charities because inclusion of additional groups would result in an unmanageable number of participants. The court suggested that if the government felt a need to restrict the number of participants it could use, *e.g.*, a first-come, first-served system. Pet. App. 35a. Of course, that approach, too, would change the nature of the Campaign significantly and, in our judgment, would drastically reduce the likelihood that federal employees would support the Campaign enthusiastically.

Parks and Conservation Association, the United States Olympic Committee, the Wilderness Society, and the National Recreation and Park Association. Because respondents did not call attention to the inclusion of these organizations at the district court stage, the record does not indicate what evidence the organizations presented to convince federal officials that they met the direct health and welfare services criterion.[40]

It is possible that inclusion of the organizations cited by the court of appeals reflected a misapplication of the direct health and welfare services criterion. But that would not affect the facial validity of the criterion itself, which is the issue in this case.[41] There will often be difficulties in determining the precise boundaries of broad categories, and officials may sometimes err in considering

[40] If the government had had occasion to submit evidence concerning the organizations singled out by the court of appeals, it would have shown, *e.g.*, that the United States Olympic Committee supplied federal officials with materials indicating, inter alia, that it encourages and supports research in medicine and safety, as well as amateur athletics among the handicapped and minorities.

Such organizations may have been included because earlier guidelines seemed to suggest that the Campaign traditionally had included at least some groups that offered recreational services (see *Manual on Fund-Raising Within the Federal Service* §§ 3.1c, 4.2e) or because the organizations did not appear so clearly cause-oriented as respondents. But see *Executive Orders 12353 and 12404 As They Regulate the Combined Federal Campaign*, *supra*, at 68 (statement of Donald J. Devine) (suggesting that sports associations and recreation societies traditionally had not been regarded as appropriate Campaign participants).

[41] The district court viewed this case as raising a facial challenge to the exclusion of advocacy groups under Executive Order No. 12,404. See Pet. App. 88a. In their complaint (¶ 16), respondents stated that "the Executive Order in fact authorizes the rejection of [respondents'] applications * * *, then it violates the First Amendment on its face" (J.A. 13).

Of course, if respondents themselves were properly excluded under valid eligibility criteria, they can hardly contend that they nevertheless should be admitted to the Campaign simply because federal officials erred in applying the criteria to several other groups.

borderline cases. Such difficulties could be avoided if, *e.g.*, federal officials simply limited participation in the Campaign to ten charities they believed would provide the maximum amount of direct health and welfare services as a result of employee contributions. However, the President has chosen to define eligibility in terms of broad categories, thereby both expanding the choices available to federal employees and retaining the concept of a focused Campaign. The latter approach ultimately must be more compatible with First Amendment values, since it avoids the need for federal officials to pick and choose among individual charities. While the difficulty of defining precise categories may lead to some uncertainty, the First Amendment surely affords some leeway for public officials to elect such general standards over a case-by-case evaluation of the worthiness of individual groups in determining access to a nonpublic forum.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 84-312

IN THE

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October Term, 1984

DONALD J. DEVINE, Director,
OFFICE OF PERSONNEL MANAGEMENT,
Petitioner

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

~~MOTION FOR LEAVE TO FILE AND~~ BRIEF OF THE UNITED BLACK FUND OF AMERICA, AMERICAN CANCER SOCIETY (District of Columbia Division, Chesapeake-Potomac Area, Montgomery County, and Northern Virginia Area Office), AMERICAN RED CROSS (District of Columbia Chapter), BOYS AND GIRLS HOMES OF MONTGOMERY COUNTY, BOY SCOUTS OF AMERICA (National Capital Area Council), LUTHERAN SOCIAL SERVICE OF THE NATIONAL CAPITAL AREA, SALVATION ARMY (National Capital Area), VISITING NURSE ASSOCIATION OF NORTHERN VIRGINIA, CENTER CITY COMMUNITY CORPORATION and the UNITED BLACK FUND OF GREATER WASHINGTON AS *AMICI CURIAE* ~~IN SUPPORT OF REVERSAL~~

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The above-named charitable and philanthropic organizations move for leave to file a brief *amici curiae* urging reversal of the decision below which held Exec. Order No. 12,404 constitutionally invalid. *Amici* believed the court below erred and its decision should be reversed by this Court.

If allowed to stand, the decision below will impede these organizations and other similar charitable organizations in attaining their goals of providing human health and welfare services directly to individuals and their families. These organizations support the government's efforts to have the Combined Federal Campaign returned to its original purpose of supporting direct health and welfare services. Because of their unique perspective and the particular effect the decision below has on them, they seek to file the accompanying brief *amici curiae* in order to bring before the Court certain considerations which they believe will be important to the Court in deciding this case.

All of the above-named organizations, as more fully set out in the Appendix to the accompanying brief, are traditional eleemosynary organizations dedicated to providing direct health or welfare service. All are long-time participants in the Combined Federal Campaign. Since the decision below will serve only to diminish the effectiveness of the entire Campaign with the result that *amici*, their program beneficiaries, and ultimately society as a whole will suffer, and because *amici* believe the Court below erred in its decision invalidating Exec. Order No. 12,404, these organizations urge this Court to grant their motion and consider their views.

Respectfully submitted,

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QUESTION PRESENTED

Whether Executive Order No. 12,404, which preserves the Combined Federal Campaign for its intended purpose of supporting traditional human health and welfare charity and thus excludes legal advocacy and certain other groups, violates the First Amendment.

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Washington Post, September 20, 1984 17

IN THE

Supreme Court of the United States

October Term, 1984

No. 84-312

DONALD J. DEVINE, Director,
OFFICE OF PERSONNEL MANAGEMENT,
Petitioner

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.,
et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE UNITED BLACK FUND OF AMERICA, AMERICAN CANCER SOCIETY (District of Columbia Division, Chesapeake-Potomac Area, Montgomery County, and Northern Virginia Area Office), AMERICAN RED CROSS (District of Columbia Chapter), BOYS AND GIRLS HOMES OF MONTGOMERY COUNTY, BOY SCOUTS OF AMERICA (National Capital Area Council), LUTHERAN SOCIAL SERVICE OF THE NATIONAL CAPITAL AREA, SALVATION ARMY (National Capital Area), VISITING NURSE ASSOCIATION OF NORTHERN VIRGINIA, CENTER CITY COMMUNITY CORPORATION and the UNITED BLACK FUND OF GREATER WASHINGTON AS *AMICI CURIAE*

The United Black Fund of America, American Cancer Society (District of Columbia Division, Chesapeake-Potomac Area, Montgomery County, and Northern Virginia Area Office), American Red Cross (District of Columbia Chapter), Boys and Girls Homes of Montgomery County, Boy Scouts of America (National Capital Area Council), Lutheran Social Services of the National

Capital Area, Salvation Army (National Capital Area), Visiting Nurse Association of Northern Virginia, Center City Community Corporation and the United Black Fund of Greater Washington submit this brief *amici curiae* in support of the petitioner and urging reversal of the decision below. *Amici* submit that the court below both failed to apply the proper analysis to resolve the straightforward issue presented and misapplied the analysis it chose to use. For these reasons, *amici* submit that the court below erred as a matter of law in invalidating Executive Order No. 12,404 on constitutional grounds.

I. INTEREST OF AMICI

Amici represent a cross-section of humanitarian charitable organizations dedicated to providing health and welfare services directly to individuals and their families. They include national organizations, community chapters and divisions of national organizations, and strictly local organizations, and they provide human health and welfare services in a variety of areas, including cancer research and patient services, disaster relief, in-home and day care for the elderly and infirm, youth development activities and food, shelter, and basic life necessities for the homeless.[1] While the precise focus of each *amicus* organization differs, they are nonpolitical, nonpartisan organizations dedicated to humanitarian service. Their purposes are recognized by citizens as community-wide concerns and there is a general consensus among federal employees and

[1] A description of each organization joining in this brief is submitted in the Appendix to this brief. While each *amicus* organization provides services in the Washington, D.C. metropolitan area, and some do so exclusively, these organizations have counterparts in communities nationwide.

citizens that these organizations provide a necessary service and are deserving of their support.

In addition to being charitable organizations with the time-honored purpose of providing human health and welfare services and thus fostering the well-being of the entire community, each *amicus* organization is a long-time participant in the Combined Federal Campaign ("Campaign"). These organizations, and particularly local organizations such as the United Black Fund and the Center City Community Corporation, obtain a substantial portion of their funding through the Campaign. *Amici* depend on the strength, viability and general acceptance of the Campaign among contributors. The issues raised in this case will in large measure determine the future of the Campaign. *Amici,* therefore, have a vital interest in the outcome of the case.

II. STATEMENT

The Combined Federal Campaign is the federal government's program for conducting an annual fund-raising effort among its employees and military personnel for the support of national and local health and welfare organizations. Over three million persons are reached by the Campaign each year in the United States and abroad. Campaigns are conducted in each local community where federal employees and military personnel work and each Campaign is directed and coordinated by federal employees.

Under the circumstances when this case arose, participating national charities were required to meet certain eligibility criteria set out in Exec. Order No. 12,404 and the regulations promulgated thereunder. Local charities were required also to meet similar requirements for

eligibility in those local communities where they provide service. In either case, a committee composed of federal employees reviewed the applications of charitable organizations for inclusion in the Campaign.

Exec. Order No. 12,404 set out certain principles to guide the Director of the Office of Personnel Management in establishing eligibility criteria. As set out, the objectives of the Campaign included lessening the burdens of government and of local communities in meeting needs of human health and welfare and avoiding the reality and appearance of the use of federal resources to assist fundraising for "political activity or advocacy of public policy, lobbying, or philanthropy of any kind that does not directly serve needs of human health and welfare." 3 C.F.R. 151 § 2(b) (1984). To carry out these objectives, the Order provided that the Campaign shall be limited to organizations providing or supporting direct health and welfare service to individuals or their families and that the services provided must directly benefit human beings, whether children, youth, adults, the aged, the ill and infirm, or the mentally and physically handicapped. Further, the Order specifically excluded those groups from participation in the Campaign which sought to influence public policy through political activity or advocacy, lobbying or litigation on behalf of parties other than themselves.

This case arose because certain charitable organizations which alleged they would have been excluded by the provisions of Exec. Order No. 12,404 have sought and obtained injunctive relief declaring the Order constitutionally invalid. The government seeks reversal of the decision below and *amici* join fully with the government in this effort.

III. ARGUMENT

Introduction and Summary

Since its inception the Campaign has served as highly effective means of harnessing the generosity of federal employees for the benefit of health and welfare charities. Support for the Campaign has been widespread because of the federal employees' confidence in the fact that their contributions were being used to fund traditional health and welfare agencies that operated without regard to politics or ideology.

The decision of the court below radically altered the character of the Campaign by mandating the inclusion of wholly different kinds of organizations, such as right-to-work and other legal advocacy groups. These organizations do not have the general acceptance by the employees that has been accorded in the past to the Campaign's traditional participants. Erosion of the goodwill on which the Campaign is based has occurred and will continue to occur if the decision below is not reversed and the Campaign is not permitted to conform to its originally intended purpose and character.

As a result of the decision below, if the government wishes to continue its sponsorship of the Campaign, it must permit participation by a vast array of organizations whose only common characteristic is their tax-exempt status. Contrary to its original intent, the Campaign can no longer require that the participants be devoted to providing direct health and welfare benefits to individuals and their families, thus lessening the burden of the government in meeting human health and welfare needs. More importantly, however, this is not a result that the Constitution requires. In concluding otherwise, the court below plainly erred.

It must be stressed as an initial matter that the government has not deprived respondents and similar organizations access to federal employees for the purpose of communicating their appeals for support. Indeed, by regulation, organizations that either choose not to participate in the Campaign or are deemed ineligible for participation may nonetheless directly appeal in the workplace to federal employees for contributions to their respective organizations. Thus, what is at issue here is not the denial of access to federal employees, but the far narrower question of whether the government may prescribe the kinds of organizations which may participate in its program for support of health and welfare charity.

The court below chose to resolve this eligibility issue through a First Amendment "forum" analysis. We explain below that if this were the appropriate analytic framework, the court still erred because it misapplied the principles and standards this Court has established for forum cases. More fundamentally, however, we point out that forum analysis is inappropriate and that the issues here are more properly addressed under equal protection principles.

Forum analysis is premised on the assumption that speech has been curtailed or limited in some fashion at a particular facility or place. This is not the case here, however. There is no particularized situs for the Campaign and, as we point out, the Campaign itself cannot be the "forum."

Thus, in the true sense there is no forum involved here. Rather, the federal government has merely established a program to raise funds among its employees for charitable purposes. Federal employees on official time, and at diverse places throughout the country, are organized dur-

ing a campaign period to receive and distribute Campaign materials, to encourage contributions from other civilian and military personnel on behalf of the participating organizations, to make payroll deductions, and to take other actions in support of the fund-raising effort. These and related forms of assistance and aid are tantamount to federal subsidies, and it is as a subsidized program that the constitutionality of the Exec. Order No. 12,404 must be considered.

In this connection, it is well-established that governmental programs and subsidies are constitutional if the distinctions they draw are rationally based. *Dandridge v. Williams,* 397 U.S. 471 (1970). Moreover, while such programs are also constrained by the First Amendment in the sense that they may not be intended to discourage the expression of particular ideas, *see Regan v. Taxation With Representation of Washington,* 461 U.S. 540 (1983), there is no such intent or effect here. The limitations on participation in the Campaign are viewpoint neutral: ideology, politics and like factors play no role in the eligibility process.

The effect of the decision below is to dictate that the government must yield all discretion with respect to the kinds of organizations which may participate in the Campaign, or have no Campaign at all. Axiomatically, however, the Constitution "does not require that [the government] must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams,* 397 U.S. at 486-487. We point out below that the classifications made by Exec. Order No. 12,404 serve legitimate governmental interests and are, therefore, rational. Since the Executive Order is even-handed and viewpoint neutral, the rationality of the classifications establishes its constitutionality.

Should the Court nonetheless determine that the issues here must be resolved under First Amendment public forum principles, we show below that the Court of Appeals still erred. First, while the court assumed, without deciding, that the forum here was nonpublic, we show that this is in fact the case. To conclude that the forum is other than a nonpublic one would be to augur the destruction of the Campaign, for as it currently exists the Campaign includes a number of limitations on what expression participating organizations can and cannot make. These limitations could only stand with the appropriate deference which is accorded in nonpublic forums. For example, there are precise limitations on the number of words that can be used by an organization to describe itself in Campaign literature and an absolute requirement that each organization's narrative description be reviewed and approved prior to its publication.[2]

While these and like restrictions are necessary to the conduct of an orderly Campaign, and they are not at issue here, if the Campaign were deemed a public or limited public forum, these restrictions could not survive constitutional challenge. Invalidation of these restrictions would set the clock back over twenty years to the time before President Kennedy issued Exec. Order No. 10,927 to bring order out of the prevailing chaos of organization upon organization making whatever kinds of appeals they chose whenever they wished to do so. Certainly, the government, just as a private employer, must have the ability to run a

[2]Current regulations do not impose these limitations, for they do not provide for any descriptions to be published. *See* 5 C.F.R. § 950.521(e)(2)(i) (1984), 49 Fed. Reg. 32735, 32751 (1984). The relevance of these limitations here is that they have historically existed and, given the Director's expressed intent to keep the Campaign intact in the event Exec. Order No. 12,404 is vindicated, *see* 49 Fed. Reg. at 32735, they presumably would be reinstated in such event.

controlled and orderly program of charitable solicitation among its employees.

After showing that at most the forum here is a nonpublic one, we then demonstrate that the Court of Appeals erred in assuming that the standard for judging limitations on activities in a nonpublic forum was more onerous than the requirement that rational basis be present. Indeed, as we point out, ultimately the standard by which the Executive Order must be judged under a forum analysis is the same rational basis standard that obtains in the equal protection context. And, for the same reasons supporting the conclusion that there is a rational basis for the classifications drawn by the Executive Order under equal protection principles, there is also a rational basis for forum analysis purposes.

A. The Eligibility Criteria Of Executive Order No. 12,404 Survive Constitutional Scrutiny Under Equal Protection Analysis

1. The court below erred in focusing on the "public forum doctrine" to resolve the issue in this case

Resolution of the question presented in this case, whether certain legal defense funds have a constitutional right to participate in the Combined Federal Campaign, is more straightforward than suggested by the opinions below. Simply, this case calls for the application of settled principles of equal protection analysis, *i.e.*, whether the distinctions drawn by Executive Order No. 12,404 are rationally based. *Dandridge v. Williams*, 397 U.S. 471 (1970). The courts below eschewed this approach to the issues and instead relied on the "public forum doctrine" to resolve this case. "Forum" analysis, however, adds an un-

necessary complication to the question raised here and, in any event, on close inspection is inapposite.

Forum analysis, of course, is premised on the assumption that the government has proscribed speech, and it begins with examination of the nature of the affected speech and the facility where the disputed speech is putatively prohibited. *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 44 (1983); *U.S. Southwest Africa/Namibia Trade and Cultural Council v. United States,* 708 F.2d 760, 766 (D.C. Cir. 1983). This Court has utilized forum analysis to test limitations on speech in facilities spanning virtually the entire spectrum of communicative forums, from state prisons to public streets and sidewalks. *See, Jones v. North Carolina Prisoners' Union, Inc.,* 433 U.S. 11 (1977); *Carey v. Brown,* 447 U.S. 455 (1980). By analyzing the nature of the facility and determining thereby whether it is a public forum, limited public forum or nonpublic forum, the Court has identified those communications that are constitutionally protected and those that the government may permissibly limit.

Significantly, in each "forum" case that has come before the Court, there has been a real, tangible facility involved. For example, in *Adderly v. Florida,* 385 U.S. 39 (1966), the Court was confronted with speech issues at a county jail; in *Widmar v. Vincent,* 454 U.S. 263 (1981) and *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167 (1976), in university and school board meeting places; in *United States Postal Service v. Council of Greenburgh Civic Ass'ns,* 453 U.S. 114 (1981), in mailboxes; and in *Greer v. Spock* 424 U.S. 828 (1976) in military bases. Furthermore, in none of these cases was there any dispute as to what facility constituted the forum.

In sharp contrast to these precedents, there is no identifiable forum involved in this case. The judges below were divided on whether to consider the Campaign itself as the appropriate forum, or whether the federal workplace was the forum. But, surely the Campaign itself cannot be a "forum," for unlike a mailbox, prison or military base, the Campaign is a governmental program, not a facility. Organizations do not seek physical access to the Campaign as they might a public transit bus or an airport display case or a billboard[3] to engage in "informative and perhaps persuasive speech." *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 632 (1980).

Similarly, the federal workplace cannot properly be characterized as a forum. To be sure, the federal workplace, unlike the Campaign, is a concrete, real situs consisting of all the thousands of federal office buildings, lands and other loci when work is performed by federal employees. But the enormity of this "forum" and the myriad variations of its individual components render it useless as a starting point to determine the degree of scrutiny the eligibility criteria must survive. Thus, for example, the federal workplace contains military bases,

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[3] Judge Gesell observed that "by providing organizations the opportunity to participate in the [Campaign], the government has, in effect, provided a billboard . . . through which these organizations can disseminate their appeals to federal workers." *NAACP Legal Defense and Educational Fund v. Campbell,* 504 F.Supp. 1365, 1367 (D.D.C. 1981). Presumably, this observation was based on the fact that participants were given 30 words in which to describe their respective organizations. 5 C.F.R. § 950.521(e)(2)(i) (1983). In Judge Gesell's analysis, the "billboard" is the *sine qua non* of the forum. The Campaign, however, would continue to exist if participating organizations were permitted only to list their names, as is now the case (*see* 5 C.F.R. § 950.211(h) (1984)), or even if the government decided not to list the participating organizations at all. Thus, while the analogy is an easy one, it does not bear scrutiny.

prisons, university meeting rooms and public parks. Yet as this Court has made clear, no one standard governs the scope of the First Amendment's protection with respect to each of these forums. In view of this, it would be nonsensical to suggest that the Constitution would tolerate application of the eligibility criteria to exclude legal defense funds from participating in the Campaign, for example, at military bases, but not at National Park facilities.

The dissent below attempted to "analyz[e] the communicative medium in the larger context of the place in which the facility exists," *NAACP Legal Defense and Educational Fund v. Devine,* 727 F.2d 1247, 1271 (D.C. Cir. 1984) (Starr, J. dissenting), and faced with selecting either the Campaign or the federal workplace as the applicable forum, it correctly chose the latter. But a third path was available that both the majority and dissent elected not to follow: because there is no forum present in this case, analysis turns not on an examination of the nature of the forum, but rather on settled principles of equal protection. For, like an individual seeking to utilize expenses for lobbying as a tax deduction, *Cammarano v. United States,* 358 U.S. 498 (1959), or an individual seeking to use federal money to pay for an abortion, *Harris v. McRae,* 448 U.S. 297 (1980), the respondent organizations here seek merely to participate in and benefit from a governmental program. In these circumstances, equal protection analysis, and not "forum" analysis, provides the appropriate standards by which to judge the disputed governmental actions. *Regan v. Taxation With Representation of Washington,* 461 U.S. at 548-49.

As this Court observed in *Members of the City Council of Los Angeles v. Taxpayers for Vincent,* 104 S.Ct. 2118, 2134 n. 32 (1984), "[g]enerally an analysis of whether property is a public forum provides a workable analytical

tool." Here, however, because this case does not fit neatly within "the paradigms of government property interests mirroring analogous private interests and those clearly held in trust, either by tradition or recent convention, for the use of the public," *id.,* the usefulness of this approach is especially limited. Indeed, application of forum analysis to the facts of this case confused the straightforward issue presented here into one that now requires this Court's clarification.

2. Equal protection analysis is the proper vehicle for resolving the issue presented in this case

As demonstrated above, attempts to classify the Campaign as a "forum" are both problematic and unenlightening. This is hardly to say, however, that the issue presented here is irresolvable, or that some novel balancing of constitutional interests is necessary. Rather, accepting the Campaign for what it is, and it is simply a federal program designed to meet certain objectives in a certain manner at a certain cost, resolution of the issue presented in this case calls for no more than application of well-established principles of equal protection.

Like many federal programs, the Campaign was implemented to accommodate and balance several competing concerns. For example, as the court below recognized, it has been the government's "long-standing policy . . . to cooperate with and assist in soliciting funds for worthy causes from Federal personnel," while at the same time it is the government's obligation to minimize disruption in its workplace to assure that its business is done. *See* 727 F.2d at 1429. Confronted with these and other competing considerations, President Kennedy in 1961 established the Campaign which, then as now, granted those who were eligible and chose to participate the unique benefits flow-

ing from the Campaign, in exchange for foregoing the opportunity to engage in direct solicitation themselves of federal employees in the workplace.[4]

Although various details of its implementation have changed, the Campaign's structure has remained largely intact since its inception. Today, as at its inception, the Campaign is a cooperative effort between charitable institutions and the federal government to facilitate the solicitation of contributions from federal employees. Military personnel and civilian employees, on official time, receive and distribute Campaign materials, and place posters urging their fellow workers to participate in the Campaign. They also arrange and conduct meetings, set contribution goals, devise methods to achieve goals and collect pledges for payroll deductions and one-time contributions and transmit payments to the PCFO. For the Washington, D.C. local Campaign, the President appoints a Cabinet Secretary or agency head to serve as Chair. Regional agency heads serve similar roles nationwide. Committees of federal employees guide each local Campaign. 5 C.F.R. § 950.509(k) (1984).

Through these efforts, the Campaign is able to raise funds at an unparallelled level of efficiency.[5] Obviously, it

[4]The Campaign is the exclusive means by which *participating* charities may solicit for contributions in the workplace. On the other hand, an organization which either elects not to participate or fails to qualify for participation in the Campaign may still seek contributions at places of federal employment "under such reasonable conditions as may be specified by the local head of the Federal installation involved." 5 C.F.R. § 950.311 (1984). Additionally, such excluded organizations are permitted to solicit at entrances or in concourses or lobbies of federal buildings normally open to the general public. 5 C.F.R. § 950.311(b) (1984).

[5]For example, in the Washington, D.C. area for the 1983-84 period, the Campaign generated contributions of over $16 million, while the amount incurred to defray the costs of the PCFO, *see* 5 C.F.R. § 950.509(e) (1984), was less than four percent.

is this efficiency which make the Campaign attractive to organizations such as the respondents here. But, there are organizations which for any number of reasons elect not to participate in the Campaign, *see* C.F.R. § 950.103(e) (1984), and there are organizations which do not meet the eligibility criteria.

Importantly, what these organizations miss by not participating in the Campaign is not the opportunity to solicit from federal workers or even the opportunity to solicit at the federal workplace. *See* 5 C.F.R. §§ 950.103(e), 950.311 (1984). Rather, what these organizations forego is the opportunity to benefit from the unique structure and heightened efficiency of the Campaign and from the fact that the government carries the bulk of the Campaign's administrative costs. Thus, "the government's assistance and efforts represent a substantial federal subsidy," *National Black United Fund v. Campbell,* 494 F.Supp. 748, 752 (D.D.C. 1980), *rev'd on other grounds,* 667 F.2d 173 (D C. Cir. 1981), and it is as a subsidized federal program that the Campaign must be viewed to assess the constitutionality of Exec. Order No. 12,404.

3. The eligibility criteria of Executive Order No. 12,404 do not offend equal protection principles

The First Amendment protects charities' fundamental right to communicate information, disseminate views and advocate their causes. *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. at 632; *Secretary of State of Maryland v. Joseph H. Munson Co.,* 104 S.Ct. 2839 (1984). But the government need not demonstrate a compelling justification every time its action affects the exercise of a First Amendment right. Rather, with respect to governmental programs and governmental subsidies,

the Constitution requires only that the government have a rational basis for its action and that its action not infringe the First Amendment by being intended to discourage the expression of particular ideas. *Regan v. Taxation With Representation,* 461 U.S. at 548; *id.,* at 551 (Blackmun, J., concurring.)[6] The eligibility criteria of Exec. Order No. 12,404 easily satisfy this standard.

It cannot seriously be doubted that the government has a rational basis for excluding certain groups from the Campaign. This is so even though these organizations are designed to serve societal needs. Indeed, that the aims of the organizations sought to be excluded may be laudable does not require that the government subsidize their operations. The government, especially when it operates in the social and welfare areas, routinely draws lines. Such classifying is both necessary and unexceptional, and, as this Court has consistently ponted out, "[a] statute is not invalid under the Constitution because it might have gone farther than it did." *Roschen v. Ward,* 279 U.S. 337, 339 (1926). There is no obligation that the government "strike at all evils at the same time," *Semer v. Oregon State Board of Dental Examiners,* 294 U.S. 608, 610 (1935), for "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 489 (1955). Simply, the Constitution "does not require that [the government] must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams,* 397 U.S. at 486-87.

[6]As the Court held, "[a] decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Id.* at 549. Thus, for example, Congress can constitutionally refuse to grant a business expense tax deduction for lobbying, even though lobbying is a fundamental right protected by the First Amendment. *Cammarano v. United States,* 358 U.S. 498 (1959). *See, also, Harris v. McRae,* 448 U.S. 297 (1980) and *Maher v. Roe,* 432 U.S. 464 (1977) (Congress can refuse to subsidize the exercise of the constitutionally protected right to abortion.)

Admittedly, the Campaign does not seek to address all ills and support all charitable endeavors. With respect to legal defense and political action organizations, however, Exec. Order No. 12,404 itself provides the justifications for the exclusionary criteria. Among other things, the eligibility criteria were based on the determination that the exclusion of political and legal advocacy groups promotes the government's interest in assuring the continued success of the Campaign, as well as its interest in seeing that the maximum amount of charitable aid goes directly to the needy, thus alleviating the government's burden As has been demonstrated by recent events, the Campaign's broad base of support has been eroded by its transformation into a collection agency for unrelated tax-exempt organizations uncommitted to health and welfare charity. *See Washington Post,* September 20, 1984, at A17, col. 3 (participation in the Campaign has fallen of by more than 15 per cent in the last five years.) Additionally, the eligibility criteria were based on the government's recognized obligation to avoid the appearance and reality of political favoritism. *Cf. United States Civil Service Comm'n v. National Assn'n of Letter Carriers,* 413 U.S. 548, 564 (1973); *Lehman v. City of Shaker Heights,* 418 U.S. 298, 304 (1974).

The rationality of these reasons is unassailable. In fact, the panel majority faulted the dissent for "inexplicably" applying a rational basis test: it did not dispute that the eligibility criteria were rational, but rather it held that the criteria did not survive the putatively higher standard of "reasonableness." 727 F.2d at 1266. Yet, "the courts are

not empowered to second-guess the wisdom of [governmental] policies," *Western and Southern Life Ins. Co. v. State Board of Equalization of California,* 451 U.S. 648, 670 (1981); it is their responsibility only to inquire into the legitimacy of the policy and whether the executive reasonably could have concluded that its action would promote that policy. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 466 (1981). That the eligibility criteria of Exec. Order No. 12,404 satisfy this standard is evident.

That the eligibility criteria are viewpoint neutral is equally obvious. Exec. Order No. 12,404 seeks to exclude from participation in the Campaign *all* "[a]gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying or litigation on behalf of parties other than themselves." 3 C.F.R. 151 § 1(b) (1984). Admittedly, there is a component of speech affected by this exclusion. But as this Court has made clear, the fact that the Executive Order may affect speech does not render it constitutionally infirm. *Regan v. Taxation With Representation,* 461 U.S. at 548.

In *Taxation With Representation,* this Court held that Congress could permissibly deny the right to receive tax-deductible gifts to organizations which engaged in substantial lobbying activities, even though lobbying is a constitutionally protected right. Presumably, so too could Congress deny 26 U.S.C. § 501(c)(3) status to organizations which "seek to influence the . . . determination of public policy through . . . litigation on behalf of parties other than themselves." And, of course, if the government could deny 501(c)(3) status to these organizations, so too could it exclude them from the Campaign.

To be sure, a different question would be presented if the eligibility criteria were predicated on the viewpoints of

the organizations it seeks to exclude or if the criteria were used in an attempt to suppress these organizations' viewpoints. *See Taxation With Representation,* 461 U.S. at 551 (Blackmun, J. concurring). But plainly, the eligibility criteria are viewpoint neutral – both pro-life and pro-choice legal defense funds would be excluded, as well as right-to-work and labor legal defense funds and Democratic and Republican political action committees. Just as in *Taxation With Representation,* the criteria here do not focus on the viewpoint of the organizations. Within the general category of excluded organizations, the full range of viewpoints is represented and no one point of view is singled-out for exclusion. This the Constitution does not proscribe.

B. The Eligibility Criteria Of Executive Order No. 12,404 Are Valid Under The "Public Forum Doctrine"

Although application of "forum analysis" to this case adds an unnecessary complication, properly applied it does not alter the result. The appropriate "forum" in this case must be viewed as a "nonpublic forum," and under the standards this Court has established in such cases the eligibility criteria of Exec. Order No. 12,404 pass constitutional muster.

1. The "forum" at issue in this case must properly be characterized as a "nonpublic forum"

Were it conceded that the applicable forum in this case was the federal workplace, it would be a simple matter to demonstrate that this "forum" is at best a nonpublic forum. Even more so than the inter-school mailboxes at issue in *Perry,* the federal workplace is "[p]ublic property which is not by tradition or designation a forum for public communication." *Perry,* 460 U.S. at 46. Of course, there

may be certain portions of the federal workplace, such as LaFayette Park where Park Service employees tend to the gardens, that are public forums in the truest sense. More generally, however, the federal workplace as a whole is dedicated to carrying out the business of the sovereign, and is not designed or intended for "purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939).

It must be borne in mind that the Campaign operates throughout the government – in the National Parks no less than in the secured offices of the Pentagon. In these circumstances, therefore, the whole of the federal workplace certainly cannot be deemed to be the "forum." Indeed, precision on this score simply is not possible, since the nebulous forum in this case may fall somewhere "between the paradigms of government property interest essentially mirroring analogous private interests and those clearly held in trust . . . for the use of citizens at large." *Taxpayers for Vincent*, 104 S.Ct. at 2134 n. 32.

The existence of this uncertainty suggests the inutility of forum analysis to resolve the issue presented here. Again, this is so because, by definition, forum analysis normally requires an absolute forum as a starting point to determine the permissibility of limitations on specified speech. Nonetheless, while there is no such tangible and singular forum here, it is still possible, without reifying it, to classify the operative "forum" here.

More specifically, there are significant limitations placed on what participating organizations can and cannot do in connection with their fund-raising. For example, the messages that participating organizations communicate to federal employees are subject to stringent limitations. Not

only is the length of these messages limited to approximately thirty words, *see* 5 C.F.R. § 950.521(e)(2)(i) (1983), but the content is also regulated. Organizations cannot advocate their causes as being more worthy than other causes, nor may they use symbols which will unduly attract attention to their causes. 5 C.F.R. § 950.521(d) (1983). In fact, the only "message" they can give is a brief description of their purposes to be included in the contributor's leaflet given to federal employees. Additionally, prior to publication these messages must be edited and approved by federal officials. *See* 5 C.F.R. § 950.521(a) (1983); 727 F.2d at 1250 n. 2.

Certainly, if such limitations on speech were attempted in the context of a public or limited public forum, they would be deemed constitutionally impermissible. The limitation of thirty-word descriptions, while arguably a reasonable time, place and manner restriction, would be sustainable only if it were "narrowly tailored to serve a significant governmental interest, and [left] open ample alternative channels of communication." *Perry*, 460 U.S. at 45, *citing United States Postal Service v. Council of Greenburgh*, 453 U.S. at 132. The government's restriction on the content of these descriptions, however, could only be permissible if it were necessary to serve a compelling state interest and if it were narrowly drawn to achieve that end. *Carey v. Brown*, 447 U.S. at 461. And, of course, the requirement that all communications be submitted to the government for its final approval would run afoul of the Constitution as "it is the chief purpose of the [First Amendment] to prevent previous restraints upon publication." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931).

That these and similar limitations have existed unchallenged for over twenty years is compelling evidence

that whatever forum the Campaign has created is nonpublic in nature.[7] Beyond this the government's interest in running a controlled charitable solicitation program in its workplace is the same as that of the private employer. As the Court noted in *Taxpayers for Vincent,* 104 S.Ct. at 2134 n. 31, "[a]t some point, the government's relationship to things under its dominion and control is virtually identical to a private owner's property interest in the same kinds of things." At this point, the government "has the power to preserve the property under its control for the use to which it is lawfully dedicated." *Id., quoting Adderly v. Florida,* 385 U.S. at 47. *Cf. McCarthy v. Philadelphia Civil Service Commission,* 424 U.S. 645, 646 n. 6 (1976); *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968). The unchallenged existence of content regulations and prior restraints in the Campaign's structure suggests that the use for which this "forum" was lawfully dedicated was not to foster communication of ideas, but to further the government's policy of encouraging its employees to support charitable endeavors while concomitantly preserving order in the federal workplace for the efficient transaction of its business. Because the purpose of the Campaign was accordingly not to provide a public forum, whatever

[7]To say that these limitations exist is not, of course, to say that they are constitutional. But limited public forums are creatures of governmental designation and use. *Perry,* 460 U.S. at 145, 46 & n. 7. The fact that these limitations have existed unchallenged for twenty years suggests that the government has not taken the steps necesary to transform government property into some form of limited public forum. *See, United States Postal Service v. Council of Greenburgh,* 453 U.S. at 129. Furthermore, if these limitations are unconstitutional, the Campaign would be transformed, despite its designated parameters, into the uncontrolled charity bazaar which it was created to replace. It would be anomalous indeed to suggest that the Constitution requires that the government have an uncontrollable charitable solicitation program, or none at all.

the precise forum may be in this case, it must be nonpublic in character. *Cf., Greer v. Spock* 424 U.S. at 838.

2. The eligibility criteria of Executive Order No. 12,404 are permissible in the context of a nonpublic forum

In a nonpublic forum, in addition to time, place, and manner regulations, the government may impose additional limitations "as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry,* 460 U.S. at 46, *citing United States Postal Service v. Greenburgh Civic Ass'n,* 453 U.S. at 131 n. 7. As the Court held in *Jones v. North Carolina Prisoners' Union,* 433 U.S. at 136, the government "need only demonstrate a rational basis for the distinctions between organizational groups."

As is discussed in detail above, there is a rational basis for the distinctions drawn by Exec. Order No. 12,404. And, significantly, the court below did not find otherwise. Rather, the panel majority invalidated Exec. Order No. 12,404 on the basis of its determination that a more stringent standard than rationality had to be met, a test that the court described as one of "reasonableness." Reasonableness in the context of nonpublic forums, however, is merely a different verbal formulation of the rational basis standard. The court below erred in holding that more than a rational basis had to be shown and thus arrogating to itself the substantive determination of the program's contours.

The function of a reviewing court in testing the reasonableness or rationality of an executive action is not to substitute its judgment for that of the executive.

Western and Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. at 670. Rather it is the court's role to ascertain whether the facts on which the classification were based could reasonably be conceived to be true by the governmental decisionmaker. *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78-79 (1911). Here, the government's stated rationale for the eligibility criteria included minimization of its burden to care for the needy and infirm, avoidance of the appearance of political favoritism and minimization of disruption in the workplace. It may be argued whether these ends will be served by the eligibility criteria, just as it may be argued that there may be better means of achieving these goals. But "it is the very admission that the facts are arguable that immunizes from constitutional attack the [executive] judgment." *Vance v. Bradley,* 440 U.S. 93, 112 (1979).

In this light, it is apparent that the eligibility criteria pass the constitutional tests of "reasonableness," *Perry,* 460 U.S. at 46, and "rationality," *Jones v. North Carolina Prisoners Union,* 433 U.S. at 136, and that therefore the court below erred in holding Exec. Order No. 12,404 constitutionally invalid.[8]

[8]In addition to being reasonable and rational, the eligibility criteria must as well be viewpoint neutral. For the reasons discussed in detail *supra,* there is no hint of viewpoint discrimination to be found in Exec. Order No. 12,404.

III. CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

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APPENDIX

THE UNITED BLACK FUND OF AMERICA

The United Black Fund of America was incorporated in 1977 to develop and monitor black-oriented fund-raising organizations throughout the nation. It currently has 27 chapters and affiliates within 20 states across the nation which serve the human health and welfare needs of the various communities in which they are located.

AMERICAN CANCER SOCIETY
(District of Columbia Division,
Chesapeake-Potomac Area,
Montgomery County Unit,
Northern Virginia Area Office)

The American Cancer Society is a voluntary organization dedicated to controlling and eradicating cancer. It provides practical help, emotional support and community health services to persons afflicted with cancer and their families. The American Cancer Society also initiates and supports lifesaving programs of research, education, service and rehabilitation. The local chapters involved here all provide services in the Washington, D.C. metropolitan area.

AMERICAN RED CROSS
(District of Columbia Chapter)

The American Red Cross, incorporated in 1917, is an emergency-oriented organization which is chartered by Congress. The District of Columbia Chapter delivers services to the metropolitan Washington, D.C. community such as providing trained volunteers who assist families to

cope with emergencies such as flood, home fires, near-drownings and other disasters. In addition, the Red Cross provides casework services to members of our armed forces, veterans and their families, and fosters opportunities for youth leadership development. It also trains volunteers to assist in hospitals and nursing homes, to teach parents to care for newborn babies, to train first-aiders in lifesaving techniques, and to transport the indigent and elderly to clinics and hospitals and help them obtain other assistance they require. In addition, the District of Columbia Chapter of the American Red Cross operates a volunteer blood program which supplies approximately 85% of all blood used in the National Captial area.

BOYS AND GIRLS HOMES OF MONTGOMERY COUNTY

Incorporated in 1964, the Boys and Girls Homes of Montgomery County provides residential, group and sheltered care to children ages 11-18 who are neglected, in need of supervision and assistance, or delinquents placed in its care by the Juvenile Court. This organization has established programs for basic child care, education, family therapy, counseling, special education and recreation. Also, the Boys and Girls Homes of Montgomery County provides medical referral services, and accepts self-referrals to its program for runaway youth.

BOYS SCOUTS OF AMERICA
(National Capital Area Council)

Since 1927 the Boy Scouts of America has reached boys in the National Capital Area through organized "Cub Packs" for boys age 8-10, "Troops" for those in ages

11-16, and a "Co-Ed Explorer Career Interest Program" for youth aged 14-18. The National Capital Area Council of the Boy Scouts of America operates Goshen Scout Camp in Goshen, Virginia, and trains local leaders to direct community scouting programs. The Council has special programs devoted to providing character development for youth in the metropolitan Washington, D.C. area.

LUTHERAN SOCIAL SERVICES OF THE NATIONAL CAPITAL AREA

Established in 1927, Lutheran Social Services of the National Capital Area provides adoption programs, foster care, emergency and juvenile delinquency and life-enrichment services, pastoral care, refugee resettlement and volunteer services for criminal offenders and ex-offenders. This group offers housing rehabilitation and counseling programs, a ministry to the aging and the homeless, and pre-trial sponsorship of persons accused of crimes.

THE SALVATION ARMY
(National Capital Area)

Incorporated in 1899, the Salvation Army provides emergency shelter, financial assistance and supplementary aid, food and clothing, as well as counseling, referral services, and Christmas food and toys to needy persons in the National Capital area. Its Corps Community Centers provide family-life counseling, character-building and athletic programs for youth, senior citizen programs, day care facilities and camping. The organization also offers a center for alcoholic rehabilitation, and provides job counseling, prison ministries and disaster relief.

VISITING NURSE ASSOCIATION OF NORTHERN VIRGINIA

Since 1939, the Visiting Nurse Association of Northern Virginia has provided intermittent home health services, including skilled nursing and home health aide care to the residents of northern Virginia. It offers physical, occupational and speech therapy, and provides the services of pediatric nurse practitioners, medical social workers, enterostomial therapists and oncology nursing specialists. Visiting nurses also provide home I.V. therapy and home care for the terminally ill.

CENTER CITY COMMUNITY CORPORATION

The Center City Community Corporation assists low-income inner city resident by offering tutorial, senior citizen and youth services. Incorporated in 1969, this organization provides computer literacy classes for all age groups, and operates a comprehensive housing counseling center aimed at assisting renters and homeowners in avoiding or overcoming housing problems.

THE UNITED BLACK FUND OF GREATER WASHINGTON, D.C.

The United Black Fund of Greater Washington, D.C. was created in 1969 to address the need for a balanced and unified fund-raising effort on behalf of community-based, non-profit organizations serving the social and economic needs of citizens in the Greater Washington area. The Fund's member agencies, ranging from the Geriatric Day Care Center to the Howard University Sickle Cell Research Center, have as their primary purpose the meeting of community health and welfare needs.

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No. 84-312

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL
FUND, INC., *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

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QUESTION PRESENTED

Whether the government violated the First Amendment when it expelled certain charities from the Combined Federal Campaign because they provide health and welfare services by engaging in litigation.

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Respondents.

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---

BRIEF FOR THE RESPONDENTS

The respondents are charities that provide health and welfare services. Although petitioner Devine refers to them as "legal advocacy groups," the respondents do not engage in (and are barred from engaging in) any partisan or political activities. They engage in little or no lobbying. Instead, they engage primarily in litigation and educational activities relating to a variety of civil rights and environmental concerns.

Petitioner did not dispute below—and does not now appear to dispute—that respondents serve health and welfare purposes. He argues only that their choice of *means*

to achieve their purposes justifies their expulsion from the Combined Federal Campaign ("CFC"). The sole issue in this case is whether exclusion on that basis passes constitutional muster.

COUNTER-STATEMENT OF THE CASE

1. Creation of the Combined Federal Campaign

The Combined Federal Campaign was established by President Kennedy in 1961 to regulate what had become a significant source of disruption in federal offices: frequent workplace solicitations by charitable organizations. As petitioner Devine acknowledges, "[p]rior to [1961], charities conducted appeals in a variety of ways in Federal installations around the world." (J.A. 308.) The large number of separate and uncoordinated appeals that occurred each year had created "an increasingly chaotic situation in Federal offices" and "an intolerable administrative burden for Federal officials." (J.A. 71, 103.)

Another concern created by unregulated solicitation prior to 1961 was the appearance of government favoritism toward particular charitable organizations:

> "Voluntary [charitable] agencies . . . did [not] appreciate the fact that some charities seemed to have the support of Federal management, while other charities were allowed, at most, to collect passively by the placement of an unattended contribution jar in an obscure corner of a lunchroom." (J.A. 309.)

Accordingly, President Kennedy established the CFC in 1961 "to limit the number of campaigns and to insure truly voluntary giving by Federal personnel." (J.A. 72, 103.) In place of the multitude of individual appeals then being made, President Kennedy directed that charities be permitted to solicit in the federal workplace "through a single, annual drive combining all participating agencies." (J.A. 309.)

President Kennedy's Executive Order 10,927 described the purpose of the CFC as follows:

> "[to provide] arrangements for such national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate to solicit funds from Federal employees and members of the armed forces at their places of employment or duty stations."

The Order spoke of solicitation by charities, not by the government. It made no mention of "traditional" charities, nor did it suggest that government officials would decide which charities were deserving of employee contributions. Rather, it focused entirely on procedural regularization of the solicitation process.[1]

In 1963, the Civil Service Commission implemented Executive Order 10,927 by promulgating the Manual on Fund-Raising Within the Federal Service (the "Manual"). The Manual specified that the CFC would be open to "nonprofit, tax-exempt agencies having specific functions in the fields of health, welfare or recreational services, or in the provision of international services . . . ." The only program requirements imposed by the Manual were the following:

> "An active and necessary program with particular regard to the welfare of the public and the persons served; evidence of consultation and cooperation with established agencies in the same or related fields; and efficient operations."[2]

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[1] E.O. 10,927 (March 18, 1961), *reprinted in* Respondents' Appendix ("Resp. App.") at 1a-2a.

[2] Manual on Fund-Raising Within the Federal Service §§ 5.21, 5.31 (Feb. 1973 ed.). This 1973 edition of the Manual was a reprint of the original 1963 version. *See id.* at iii. Counsel for respondents have lodged a copy of this edition with the Clerk of the Court.

Petitioner has lodged with the Court the *1977* edition of the Manual, containing amendments through September 5, 1980. The

Like the Executive Order, the Manual contained no suggestion that participation would be confined only to "traditional" or "noncontroversial" charities. Nor did the Manual indicate in any way that organizations that discharge their charitable functions by litigating on behalf of others were considered "inappropriate" charities.[3]

2. Solicitation in the Federal Workplace Through the CFC

The stated purpose of the CFC under President Reagan's Executive Order 12,404 (as well as under its predecessors) is to provide a means for charities "to solicit contributions from Federal employees . . . at their places of employment." (Resp. App. 6a.) Since 1961, the CFC has been "the *exclusive* vehicle for on-the-job charitable solicitation" of federal employees.[4] A charity denied participation in the CFC may not solicit contributions in the federal workplace by any other means.[5] Nor, under the regulatory scheme at issue here, may federal

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requirement in that edition that CFC participants provide "direct services to persons in the fields of health and welfare" (§ 5.21)—on which petitioner relies so heavily here—was not contained in the 1963 Manual; it was added some time after the 1973 reprint.

[3] As the district court found, "plaintiffs do fall within the limits of [the CFC] as it historically has existed. Executive Order 10927 made no differentiation among charitable organizations on the basis of how they accomplish their objectives." Pet. App. 90a.

[4] *National Black United Fund, Inc.* v. *Devine*, 667 F.2d 173, 174-75 (D.C. Cir. 1981) (emphasis added). *See* Pet. App. 2a; Pet. Br. 3-4, 25.

[5] The United Black Fund of America and others incorrectly assert in their *amicus* brief that organizations excluded by the CFC "may nonetheless directly appeal in the workplace to federal employees for contributions to their respective organizations." Br. at 6; *see id.* at 15. In reality, the regulations provide only that limited arrangements may be made for *off-the-job* solicitations on military institutions and at *entrances* to Federal buildings ("for example, the use of 'poppies' or other similar tokens by veterans organizations"). 5 C.F.R. § 950.311 (1984).

employees designate nonparticipating charities as recipients of their contributions.

The CFC solicitation does not take the form of physical entry into the workplace by representatives of the participating charities. Instead, a brochure describing the participants has been distributed to virtually all federal civilian and military employees. The brochure has included a specific appeal from each participating charity, in the form of a 30-word statement identifying itself and describing its activities. *See* 5 C.F.R. § 950.521(e)(2)(i) (1984). The charities themselves—not government officials—have prepared the 30-word statements.[6] We have included in Respondents' Appendix two examples of CFC brochures: one involving many participants and the other involving relatively few (Washington, D.C. and Honolulu, Hawaii). (Resp. App. 59a-66a.)

Under the regulatory scheme at issue here, participation in the Campaign historically has involved a two-step annual application process. *First*, an organization that wishes to participate has had to apply to the Office of Personnel Management ("OPM") for certification of its national eligibility. *See* 5 C.F.R. § 950.407 (1984).[7]

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[6] Although petitioner states that government officials may edit a participant's statement "if it does not conform to the regulatory requirements," he concedes that, in reality, the 30-word statements routinely are published in the form submitted by the participating charity. *See* Pet. Br. 27 & n.21. Contrary to petitioner's suggestion that the CFC is conducted "largely at government expense" (Pet. Br. 3), all direct costs of the Campaign (including preparation of the brochure and other promotional materials) are borne by the participating charities. 5 C.F.R. § 950.521(a) (1984). Petitioner introduced no evidence as to the indirect cost to the government of the time devoted by its employees to the CFC.

[7] This entails, among other things, a showing that the entity is "organized on a national scale," has earned "goodwill and acceptability throughout the United States," and has "national scope" based on its provision of services, the sources of contribution support, and the national character of its campaign. 5 C.F.R. § 950.403(c) (1984). The new CFC regulations adopted after the

Second, an organization deemed nationally eligible by OPM has had to apply separately to each of the 550 local Campaigns in which it wishes to participate. *Id.* § 950.211(h).

3. Designated Versus Undesignated Contributions

Historically, federal employees have contributed to the CFC in either of two ways. The employee may make a *designated* contribution, specifying which CFC participant shall receive the funds.[8] Alternatively, the employee may make an *undesignated* contribution, which the organization responsible for administering the local Campaign (the "Principal Combined Fund Organization" or "PCFO") may distribute to participating organizations that it deems appropriate. *Id.* § 905.509(g), .513(a).

The respondents and other legal defense funds receive only those CFC contributions that are specifically designated to go to them; they do not participate in the distribution of undesignated contributions.[9] Therefore, federal employees who do not want their contributions to aid a legal defense fund either may designate their contributions to go to groups they prefer or may make undesignated contributions.[10]

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decision below, 49 Fed. Reg. 32,735-53 (1984), eliminate the national eligibility process.

[8] In recent years, the CFC has encouraged federal workers to make designated contributions. *See* 5 C.F.R. § 950.513(a) (1984); J.A. 84-87.

[9] *See* Pet. App. 12a-13a, 31a, 89a, 95a; Pet. Br. 12 n.12. The distribution of undesignated funds is not at issue in this case. *See generally NAACP Legal Defense & Educ. Fund, Inc.* v. *Devine*, 560 F. Supp. 667 (D.D.C. 1983).

[10] Petitioner Devine has explained that this designation option has enabled employees opposed to the activities of particular charities to ensure that none of their contributions would go to such groups: "Most workers still contributed to the [Fall 1982] campaign, but earmarked their donations for specific charities, thereby

Thus, if the decision below is affirmed, legal defense funds that participate in the CFC will continue to receive only those contributions that are specifically designated to go to them by contributing federal employees.

4. Participation in the CFC by Legal Defense Funds

In 1980, three organizations applied to the CFC that had not previously participated in it: the NAACP Legal Defense and Educational Fund, the Puerto Rican Legal Defense and Education Fund (both respondents here), and the NAACP Special Contribution Fund. The Special Contribution Fund was allowed to participate in the Campaign (as were legal aid societies). The other two organizations were excluded for the stated reason that, "while otherwise qualified, [they] do not provide 'direct services,' but rather serve as advocates for groups."[11]

The two excluded organizations brought suit challenging their exclusion and were ordered admitted to the Campaign. *NAACP Legal Defense & Educational Fund, Inc.* v. *Campbell*, 504 F. Supp. 1365 (D.D.C. 1981) (*"NAACP-LDF I"*). The district court concluded that "the government must meet First Amendment strictures

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avoiding the possibility that their gifts would go to unwanted recipients." J.A. 21.

[11] The government's avowed basis for admitting the Special Contribution Fund, while excluding the other two groups, was that the latter two spent more than 50 percent of their budgets on litigation, while the Special Contribution Fund spent only 25 percent of its budget on such activity. *See NAACP Legal Defense & Educ. Fund, Inc. v. Campbell*, 504 F. Supp. 1365, 1366, 1367-68 n.3 (D.D.C. 1981). Testimony of NAACP officials in 1979, however, made clear that much of the Special Contribution Fund's resources are expended on litigation in opposition to segregation and employment discrimination. *See Combined Federal Campaign: Hearings Before the Subcomm. on Civil Service of the House Comm. on Post Office & Civil Service*, 96th Cong., 1st Sess. 384-86 (1979) (statement of Theodore M. Berry, General Counsel, NAACP) [hereinafter cited as *"1979 Hearings"*].

in its regulations concerning access to this channel of communication [the CFC], which is, in fact, the only channel by which organizations can appeal to government employees at their workplace." *Id.* at 1367. The court held that the "direct services" requirement imposed by the Manual on Fund-Raising was unconstitutionally vague and was inconsistent with Executive Order 10,927. *Id.* at 1367-68. The government did not appeal the district court's order directing the plaintiffs' admission to the Campaign.

Following the district court's decision in *NAACP-LDF I*, several legal defense funds (among them, five of the present respondents) applied for admission to the 1982 Campaign (*i.e.*, the charity drive occurring in the Fall of 1981). (J.A. 347.) Petitioner Devine stated that he did not have time to bring the 1982 Campaign into conformity with the district court's order by developing more precise eligibility standards, and he accordingly admitted several of these organizations. (J.A. 56.) They thereafter applied, and were admitted, to a large number of local Campaigns.

Participation by legal defense funds did not harm the 1982 Campaign. On the contrary, 1982 was a record year. Overall contributions rose by almost nine percent. The rate of participation among federal workers also increased by nine percent. (J.A. 430.)

Despite the unprecedented success of the 1982 Campaign, petitioner Devine mounted his own campaign to persuade the President to expel legal defense funds from the CFC. In a memorandum to the Office of Management and Budget, petitioner proposed issuance of a new Executive Order expelling legal defense funds, on the theory that their activities "clearly conflict with the thrust of the President's budget decisions." (J.A. 71-82.)

The President rejected petitioner Devine's proposal. On March 23, 1982, President Reagan issued Executive

Order 12,353, which defined eligibility for participation in the CFC in the same terms as had President Kennedy's Executive Order: "national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate." [12]

Petitioner Devine implemented this Executive Order by issuing new CFC regulations that expressly permitted participation by legal defense funds.[13] The Office of Personnel Management issued a press release on July 2, 1982 praising the new regulations (in petitioner Devine's words) for " 'offer[ing] Federal employees a wide choice of charities to select, and . . . encourag[ing] them to make their contributions in a very personal way, by carefully selecting the individual charities they'd like to benefit.' " Petitioner Devine explained that the regulations had been tailored to remove doubts as to "the eligibility of legal defense, minority and women's organizations," because " 'OPM is persuaded that some of the earlier [eligibility] criteria were overly restrictive . . . .' " (J.A. 84-87.)

The Administration's decision in 1982 to allow legal defense funds to remain in the Campaign was voluntary. The government could have complied with the ruling in *NAACP-LDF I* by issuing a more precise "direct services" requirement. Instead, President Reagan considered petitioner Devine's request for exclusion and rejected it.

5. Expulsion of Legal Defense Funds from the Campaign

In 1982, several legal defense funds in addition to those that had participated in the 1982 Campaign (including the remaining respondents here) applied for entry into the 1983 Campaign. One of the new applicants

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[12] Executive Order 12,353, § 1 (March 23, 1982), *reprinted in* Resp. App. 3a-5a.

[13] 5 C.F.R. § 950.101(a)(3)(vii) (1983), *reprinted in* Resp. App. 9a.

was the National Right to Work Legal Defense Foundation, which engages in litigation opposed to compulsory membership in labor unions. Various federal employees and labor unions wrote letters to OPM expressing hostility to the legal defense funds generally and, in particular, to the Right to Work Foundation. (J.A. 358, 365, 378.) Although a few labor unions threatened to boycott the CFC because of the Right to Work Foundation's participation, the AFL-CIO forbade its constituent groups to boycott the Campaign. Instead, it urged "all federal and postal employees to designate the agency or agencies that meet their definition of a true charity." (J.A. 91-94.)

Notwithstanding the flurry occasioned by the Right to Work Foundation's participation, the 1983 Campaign—which included more legal defense funds and more charities of other types than any prior Campaign—set a new record for charitable contributions. Total contributions increased by seven percent over 1982, and the rate of employee participation rose by three percentage points.[14] The most significant change occurred in the number of employees who designated their contributions to go to specific groups: the volume of such contributions as a percentage of the total rose by one-fourth in 1983, to 63 percent. (J.A. 430.)

The record also demonstrates that, when given the opportunity, federal employees have made substantial designated contributions to legal defense funds. During the 1982 and 1983 Campaigns, the NAACP Legal Defense and Educational Fund, for example, received over $525,000 in contributions from thousands of federal workers in over 130 localities. (J.A. 228, 234-35.) In 1983 alone, legal defense funds received $350,000 just in the National Capital Area CFC, and an estimated $2 million nationwide. (J.A. 51-52.)

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[14] *See* CFC Memorandum No. 83-15 (OPM Nov. 28, 1983), *reprinted in* Resp. App. 55a-57a.

Despite the success of the 1982 and 1983 Campaigns, petitioner Devine renewed his effort to expel legal defense funds from the CFC. In a February 2, 1983 memorandum to the White House, petitioner again proposed a new Executive Order that would accomplish his objective. He emphasized the "problems" allegedly caused by the participation of "aggressive and controversial political and legal advocacy groups"—in particular, the Right to Work Foundation. He singled out respondents NAACP Legal Defense and Educational Fund and Sierra Club Legal Defense Fund as examples of organizations that would be expelled by the proposed Executive Order. (J.A. 102-10.)[15]

Petitioner Devine's persistence finally yielded results. On February 10, 1983, President Reagan issued Executive Order 12,404. Section 1(b) of the Order effectively expelled all legal defense funds from the CFC by declaring ineligible for participation any organizations that "seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or *litigation on behalf of parties other than themselves.*"[16] Organizations that provide "legal aid services" to needy individuals, on the other hand, were made eligible to participate in the CFC.[17]

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[15] In subsequent Congressional testimony, petitioner acknowledged that "really just one or two or three groups have caused most of the controversy in the Campaign." Again, he singled out union opposition to the Right to Work Foundation. *Executive Orders 12353 and 12404 As They Regulate the Combined Federal Campaign: Hearing Before a Subcomm. of the House Comm. on Government Operations (Part I)*, 98th Cong., 1st Sess. 177 (1983) (testimony of Donald Devine) [hereinafter cited as *"1983 Hearing"*].

[16] E.O. 12,404, § 1(b) (Feb. 10, 1983), *reprinted in* Resp. App. 7a (emphasis added).

[17] The regulations issued to implement Executive Order 12,404 provide that eligible "voluntary charitable health and welfare agenc[ies]" include, *inter alia*, organizations providing "[l]egal

In a press release announcing the new Executive Order, the Office of Personnel Management explained the Administration's action as follows:

> "Devine also acknowledged the fierce opposition of Federal employee organizations and labor unions to the recent past inclusion of advocacy groups in the CFC. . . . Devine added, 'We asked the Federal workers to stay with the campaign and to give us one year to clean it up. They kept their part of the bargain, and now President Reagan has fulfilled our promise.'" (J.A. 21.)

6. The Litigation Below

Following the promulgation of Executive Order 12,404, the respondents filed suit alleging that their expulsion from the CFC violated their First Amendment right to engage in charitable solicitation. In the district court, petitioner Devine argued that expulsion of legal defense funds was necessary in order to avoid the "controversy" that he contended had surrounded their participation in the 1982 and 1983 Campaigns.[18] The district court concluded, however, that petitioner's proffered justification was impermissible under the First Amendment. (Pet. App. 93a.) The government did not seek a stay of the district court's order, and the respondents thereafter participated in the 1984 Campaign.[19]

In the court of appeals, petitioner Devine downplayed the "controversy" justification. Instead, he argued that the CFC constitutes a government "subsidy" that he may dispense as he sees fit, free of First Amendment scrutiny.[20] The majority in the court of appeals rejected the "subsidy" rationale. (Pet. App. 14a-17a.) Even the dissenting judge declined to accept the "subsidy" justification. (*Id.* at 45a n.1.) The court of appeals affirmed the district court's judgment directing inclusion of the respondents in the Campaign. A divided court denied rehearing *en banc*. (*Id.* at 80a-81a.) The present petition for certiorari followed.[21]

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aid services . . . to needy, poor, and indigent individuals solely because of their inability to afford legal counsel and without a policy or practice of discrimination for or against the kind of cause, claim, or defense of the individual." 5 C.F.R. § 950.101(a)(1)(i)(H) (1984). Respondents contended in the district court that admitting legal aid organizations, while excluding legal defense funds, violated the equal protection clause. The district court did not reach the equal protection issue. It held that exclusion of legal defense funds from the receipt of designated contributions violated the First Amendment, and that their exclusion from the receipt of undesignated funds was raised prematurely in that final regulations had not yet been issued. Pet. App. 95a.

[18] Petitioner emphasized the "overwhelming public outcry against continued inclusion" of legal defense funds and maintained that Executive Order 12,404 was a "response to these concerns and threats." *See* J.A. 345; Defendant's Motion to Dismiss 12 (April 12, 1983); Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment 13-18, 46-47 (May 24, 1983).

[19] As we demonstrate below, the 1984 Campaign (held in the Fall of 1983) set a new record for total contributions. *See* page 34 *infra*.

[20] *See* Brief for Appellant 24-39 (Sept. 1983).

[21] On August 16, 1984, after the court of appeals entered its order affirming the district court, petitioner Devine promulgated a new set of CFC regulations. 49 Fed. Reg. 32,735-53 (1984) (to be codified at 5 C.F.R. Part 950). The most significant of the changes effected by the new regulations was the elimination of the national eligibility process. The new regulations allow federal employees to specify as the recipient of their contributions any health and welfare entity that qualifies for tax exemption under Section 501(c)(3) of the Internal Revenue Code. *See id.* at 32,744 (to be codified at § 950.211(h)). As before, undesignated contributions are to be turned over to the local Principal Combined Fund Organization for distribution to local charities. *Id.* at 32,736, 32,743, 32,749-50 (to be codified at § 950.509(g), .513(a), .521(e)(1)(iv)). The new regulations also eliminate the CFC leaflet containing each participating organization's 30-word statement. In its place, local Campaigns may elect to distribute a list of charities that previously have participated in the CFC, and participating organizations may provide their own informational brochures for limited distribution to federal workers. *Id.* at 32,750 (to be codified at § 950.521(b)).

SUMMARY OF ARGUMENT

The respondents are long-established, well-known legal defense funds that serve health and welfare objectives, in large part by means of litigation in the courts. They do not seek special status or favor before the government or in the Combined Federal Campaign. They seek only the same opportunity to solicit contributions as is accorded charitable organizations that serve similar purposes by means other than litigation. The respondents do not demand the right to maintain a physical presence in the federal workplace, or even to distribute their own fundraising materials, but merely to have their 30-word appeals included in the brochure circulated to federal employees through the CFC. The respondents ask only that federal employees who wish to support them be allowed to do so by designating them as the beneficiaries of their CFC contributions.

This case does not involve a choice among charitable objectives. Both courts below correctly concluded—and petitioner has never disputed—that the legal defense funds expelled from the CFC provide health and welfare services to human beings, just as do the so-called "traditional" charities admitted to the CFC by petitioner Devine. The sole difference is that the respondents perform their services primarily by exercising their constitutionally protected right to engage in litigation, rather than by other means (including litigation by legal aid societies, which petitioner deems acceptable). In *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), this Court held that charities may not be denied the right to solicit contributions on the basis of how they spend the money they receive. Nor may adverse government action be based upon the fact that respondents vindicate their clients' legal rights by recourse to the courts. *See NAACP* v. *Button*, 371 U.S. 415 (1963). No matter how the applicable legal test is formulated, petitioner Devine's ongoing effort to purge the CFC of legal defense funds cannot be sustained.

We establish initially that restrictions upon participation in the CFC are subject to First Amendment scrutiny. This Court long has recognized that the First Amendment protects the right of charitable solicitation. Petitioner Devine's attempt to evade constitutional scrutiny by asserting that "the amount of expressive activity by charities involved in the Campaign has always been quite minimal" and that the "First Amendment interests of groups that wish to participate are decidedly weak" (Pet. Br. 26, 28) must fail on the record in this case.

We next demonstrate that expulsion of legal defense funds from the CFC violates the First Amendment, regardless of what type of forum the CFC is deemed to be. Participation in the Campaign by legal defense funds plainly is compatible both with the purposes of the CFC and with the government's legitimate interest in maintaining the federal workplace for its intended purposes. The courts below correctly found nothing in the record to support petitioner's concern that participation by respondents in the CFC would cause any disruption of either the Campaign or the workplace.

Petitioner Devine's assertion that the basic purpose of the CFC is to enable the government to direct employees' contributions to "traditional" charities, whose goals he deems more "worthwhile" than those of legal defense funds, distorts the basic function of the Campaign. The CFC historically has served as a "clearinghouse" or "publicity and collection agent." The use of "traditionality" as the litmus test for eligibility never has appeared in the Executive Orders or implementing regulations. Moreover, historically it has been the individual contributor, not the government, who has decided which charities are "worthy" of his contribution. Some federal employees prefer to help the needy by facilitating their access to

the judicial system rather than by other forms of assistance, or to promote public health by seeking enforcement of pollution laws that prevent illness rather than treatment to cure it. These employees should be free to designate their contributions accordingly.

Petitioner Devine's specific objections to participation by legal defense funds are devoid of any factual support in the record. *First*, petitioner's concern that legal defense funds sparked "controversy" among some federal employees concededly involves only "one or two" participants—none of them respondents here. Moreover, the record amply demonstrates that even such "controversy" had no discernible impact on the federal workplace or the success of the CFC. In any event, this Court consistently has held that the government may not silence a speaker because others in the audience might find his views objectionable. The First Amendment does not permit government officials to decide whose message is too "controversial" to be afforded access to a government-controlled medium of expression.

Second, petitioner Devine's ostensible wish to maintain the appearance of "neutrality" among competing charities does not justify the expulsion of legal defense funds. It is individual federal workers, not the government itself, who contribute to these organizations and should be able freely to choose among them. A simple disclaimer in the CFC brochure would satisfy petitioner's professed concern.

Third, petitioner Devine's apprehension that the CFC would be "inundated" by legal defense funds is illusory. By his own admission, the Executive Order would have excluded only a handful of such groups. Contrary to petitioner's present assertion, the courts below did *not* require the admission to the Campaign of all entities entitled to claim the charitable exemption provided by Section 501(c)(3) of the Internal Revenue Code.

Finally, petitioner Devine's assertion that alternative fundraising channels are available to legal defense funds misses the mark. The CFC is a particularly efficient, effective means of reaching federal employees. If the respondents are expelled from the CFC, they will be forbidden to solicit contributions in the federal workplace, for only through the CFC is such solicitation permitted. The alternatives proposed by petitioner are palpably deficient. They do not constitute reasonable substitutes for the right to participate in the Campaign.

ARGUMENT

THE EXPULSION OF LEGAL DEFENSE FUNDS FROM THE CFC VIOLATES THE FIRST AMENDMENT

A. The First Amendment Protects the Right of Charitable Solicitation

In numerous decisions, this Court has held that charitable solicitation is an activity protected by the First Amendment.[22] For example, in *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), Justice White wrote for the Court:

> "Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solici-

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[22] *See, e.g., Secretary of State* v. *Joseph H. Munson Co.*, 104 S. Ct. 2839, 2849 (1984); *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Breard* v. *Alexandria*, 341 U.S. 622, 641-42 (1951); *Thomas* v. *Collins*, 323 U.S. 516, 531 (1945); *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 111 (1943); *Largent* v. *Texas*, 318 U.S. 418, 422 (1943); *Jamison* v. *Texas*, 318 U.S. 413, 414 (1943); *Valentine* v. *Chrestensen*, 316 U.S. 52, 54 (1942); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-05 (1940); *Schneider* v. *State*, 308 U.S. 147, 161 (1939); *Lovell* v. *City of Griffin*, 303 U.S. 444, 450 (1938).

> tation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease."

Id. at 632.[23]

Petitioner seeks to distinguish participation in the CFC from charitable solicitation protected by the First Amendment. He asserts that "the amount of expressive activity by charities involved in the Campaign has always been quite minimal" and that the "First Amendment interests of groups that wish to participate are decidedly weak." (Pet. Br. 26, 28.) Petitioner does not, however, deny that the 30-word appeal in the CFC brochure—or the mere listing of a participant's name—constitutes a protected form of expression. Moreover, petitioner ignores this Court's holding in *Schaumburg* that, apart from the communication that accompanies charitable solicitation, the solicitation itself is protected because of "the reality that without solicitation the flow of such information and advocacy would likely cease." 444 U.S. at 632.[24]

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[23] In dealing with restrictions upon participation in the CFC, the lower courts consistently have recognized that such participation constitutes charitable solicitation protected by the First Amendment. *See, e.g.*, Pet. App. 14a; *id.* at 88a-89a; *National Black United Fund, Inc.* v. *Devine*, 667 F.2d 173, 178 (D.C. Cir. 1981); *NAACP Legal Defense & Educ. Fund, Inc.* v. *Campbell*, 504 F. Supp. 1365, 1366-67 (D.D.C. 1981).

[24] In the court of appeals, petitioner Devine contended that this is not a First Amendment case, but a "government subsidy" case—in effect, that the CFC is largess that the Administration may dispense or withhold as it pleases. *See* Brief for Appellant 24-39 (Sept. 1983) (relying upon *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983)). In this Court, petitioner appears to have abandoned the "subsidy" rationale.

In any event, the evidentiary record belies any claim that the CFC was established as a government "subsidy" program or—prior to petitioner Devine's arrival—operated as one. Both of the courts below found to the contrary. *See* Pet. App. 15a, 93a-94a. *Cf. 1979 Hearings* at 31 (statement of Alan K. Campbell, Director, OPM) ("Remember, we are talking about Federal employees' money now, not tax money."). Moreover, the court of appeals correctly held that the presence of an incidental element of subsidization would not relieve petitioner of First Amendment constraints. Pet. App. 16a-17a. That conclusion is compelled by this Court's recent decision in *F.C.C.* v. *League of Women Voters*, 104 S. Ct. 3106, 3128 (1984) (rejecting subsidization argument as basis for restrictions on First Amendment activity). *See generally Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 157-58 (1946).

B. The Judgment Below Should Be Affirmed Irrespective of Whether the CFC Is a Limited Public Forum or a Nonpublic Forum

In establishing an annual campaign during which participating charities are permitted to solicit contributions from federal employees in the workplace, the government has created a forum for the exercise of charities' First Amendment right to solicit contributions. Petitioner Devine argues that, for purposes of First Amendment analysis, the forum is the federal workplace, rather than the CFC. (Pet. Br. 23.) As this Court has recognized, however, it is the particular channel of communication—*i.e.*, the designated medium of expression—that constitutes the forum for First Amendment purposes. *See, e.g.*, *Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37, 44 (1983) (interschool mail system and teacher mailboxes, rather than school buildings); *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114, 132 (1981) (mailbox approved for deposit of mails by the Postal Service).

In this case, the forum plainly is the CFC. Permitted expression takes place exclusively within the designated medium of Campaign expression: the brochure setting forth the charities' 30-word statements. Respondents assert no right to enter into the federal workplace or to

engage in any form of expressive activity other than that permitted to Campaign participants—namely, the submission of their 30-word statements for inclusion in the brochure. Inclusion of their statements in a brochure that already contains like statements on behalf of similarly situated charities involves none of the incompatibility between expression and forum that formed the basis of the decisions cited by petitioner.[25]

Whether the forum is the CFC, as respondents suggest, or the federal workplace, as petitioner argues, all parties are in agreement that the forum is not a traditional public forum, like a street or park, "which by long tradition or by government fiat [has] been devoted to assembly and debate." *Perry Education Association*, 460 U.S. at 45. Rather, the forum is a limited public forum, designated by the President since 1961 as the exclusive opportunity for health and welfare charities to solicit federal employees in the workplace for charitable contributions.[26] The district court so held (Pet. App. 89a-

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[25] *Cf. Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (entry sought into prison for purpose of conducting labor union meetings); *Adderley* v. *Florida*, 385 U.S. 39 (1966) (entry sought into jail for purpose of conducting protest); *Greer* v. *Spock*, 424 U.S. 828 (1976) (entry sought into military base for purpose of engaging in partisan political speech and distributing leaflets).

[26] Although the government was not required to establish the CFC or otherwise to open up the federal workplace for charitable solicitation (and while the President arguably could terminate the CFC altogether), so long as the CFC is conducted, the government "is bound by the same standards as apply in a traditional public forum." *Perry Education Association*, 460 U.S. at 46. Any content-based exclusion of health and welfare charities from the CFC must serve a compelling government interest and be narrowly drawn to achieve that end. *Id.* at 45. Any time, place, and manner restrictions must be content-neutral, be narrowly drawn to serve a significant government interest, and leave open "ample" alternative channels of communication. *Id. See also Regan* v. *Time,*

91a), as has every other court that has considered the issue.[27]

The court of appeals assumed, without deciding, that the CFC was a nonpublic forum, because it concluded that petitioner Devine's effort to expel legal defense funds from the Campaign failed to satisfy even the "reasonableness" test applicable to exclusion from a nonpublic forum. Thus, it was unnecessary for the court of appeals to reach the question whether expulsion of legal defense funds comports with the more exacting standards governing restrictions upon access to a limited public forum.

Respondents will demonstrate below that petitioner's expulsion of legal defense funds from the CFC does not satisfy even the "reasonableness" test applicable to exclusion from a nonpublic forum. *A fortiori*, the expulsion does not serve any compelling governmental interest, as is required to sustain exclusion from a limited public forum. Accordingly, while respondents believe that the district court was correct in finding that the CFC is a limited public forum, this Court (like the court of appeals) can answer the question presented without reaching the issue whether the CFC is a limited public forum or a nonpublic forum.

Inc., 104 S. Ct. 3262, 3266-67 (1984); *Clark* v. *Community for Creative Non-Violence*, 104 S. Ct. 3065, 3069 (1984).

The government seeks to evade these standards by arguing that its policy of "selective access" among charitable organizations renders the CFC—which exists only as a channel for expressive activity—a nonpublic forum. *See* Pet. Br. 26. Were this true, the government could transform any limited public forum into a "nonpublic" one simply by gerrymandering the standards of access to exclude the groups it disfavors. The government would never need to show that its content-based exclusions were narrowly drawn to serve a compelling government interest; instead, it would only have to recite that the groups excluded were not "designated" for "selective access."

[27] *See National Black United Fund, Inc.* v. *Devine*, 667 F.2d 173, 178 (D.C. Cir. 1981); *NAACP-LDF I*, 504 F. Supp. at 1367; *Na-*

C. To Survive First Amendment Scrutiny, the Denial of Access to a Nonpublic Forum Must Be Reasonable

Even when government property constitutes a nonpublic forum, the government may not exclude particular groups at will. The denial of access will be upheld only if it "is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Education Association*, 460 U.S. at 46.[28]

The crucial inquiry is whether the activity excluded from a nonpublic forum is fundamentally incompatible with the government property in question. In *Perry*, the State was permitted to regulate access to government property in order to "limi[t] a nonpublic forum to activities compatible with the intended purpose of the property." 460 U.S. at 49. *See id.* at 55 ("the State may draw distinctions which relate to the special purpose for which the property is used"). Similarly, in *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 435 U.S. 114 (1981), the Court upheld the denial of access to letterboxes for the distribution of leaflets because "appellees' First Amendment activities are *wholly incompatible* with the maintenance of a nationwide system for the safe and efficient delivery of mail." *Id.* at 130 n.6 (emphasis added). As Justice Powell explained in his concurring opinion in *Greer* v. *Spock*, 424 U.S. 828 (1976):

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tional Black United Fund, Inc. v. *Campbell*, 494 F. Supp. 748, 755-56 (D.D.C. 1980), *rev'd on other grounds*, 667 F.2d 173 (D.C. Cir. 1981). Although these decisions did not use the precise words "limited public forum," they described the CFC in equivalent terms.

[28] The Court articulated the "reasonableness" requirement in numerous decisions that preceded *Perry*. *See, e.g., United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 n.7 (1981); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 130 (1977); *Lehman* v. *City of Shaker Heights*, 418 U.S. 300, 303-04 (1974) (plurality opinion). *Cf. id.* at 304 (access restriction "must not be arbitrary, capricious or invidious").

> "[I]t is not sufficient that the area in which the right of expression is sought to be exercised be dedicated to some purpose other than use as a 'public forum,' or even that the primary business to be carried on in the area may be disturbed by the unpopular viewpoint expressed. . . . *Some basic incompatibility must be discerned between the communication and the primary activity of an area.*"

Id. at 843 (emphasis added; citation omitted).

The Court's decisions make clear that exclusion of particular groups requires more than just some difference from the included groups. There must be a basic conflict between the activities of the excluded groups and the activities normally conducted on the government property.

Petitioner seems to suggest that "deference" to public officials' judgments of what is best for their agencies requires uncritical acceptance of any claims of incompatibility. (Pet. Br. 46.) But the "reasonableness" test is deferential, not toothless. In the nonpublic forum cases, this Court regularly has reviewed the government's reasons for denial of access to assess their merit.[29] The Court has not blindly accepted unsupported government assertions of a supposed need to exclude expressive activity.[30]

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[29] *See, e.g., Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 127 (1977); *Pell* v. *Procunier*, 417 U.S. 817, 827 (1974).

[30] In some of the nonpublic forum cases, the parties seeking access did not deny that the government restrictions at issue were reasonable. Instead, they argued that the restrictions failed to satisfy the strict scrutiny that would have applied had the property constituted a public forum. In those cases, therefore, the Court did not need to examine closely the reasonableness of the restrictions, once it concluded that the property was a nonpublic forum. *See, e.g., Lehman* v. *City of Shaker Heights*, 418 U.S. 300, 303-04 (1974) (plurality opinion).

Contrary to petitioner Devine's assertion, this Court has *not* treated the reasonableness test as though it were fungible with the "rational basis" test applied in equal protection cases. (*See* Pet. Br. 45-46.) Under the latter test, the Court will uphold government action if it can conceive of a hypothetical rationale that would justify the action; the Court will not independently assess the validity of the factual predicates for the government's decision.[31] That approach differs from the reasonableness test, which involves independent judicial scrutiny of the evidentiary (as opposed to hypothetical) support for the government's exclusionary actions. Petitioner concedes here that the Court's use of the rational basis test in nonpublic forum cases has occurred "in the context of discussions of equal protection challenges to the access restrictions at issue." (Pet. Br. 46 n.37.) By contrast, the First Amendment discussions in those cases applied the reasonableness test. *See Perry Education Association*, 460 U.S. at 49-50; *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 128-30.[32]

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[31] *See, e.g., Regan* v. *Taxation With Representation*, 461 U.S. 540, 547-48 (1983); *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461-64 (1981); *McDonald* v. *Board of Election Comm'rs*, 394 U.S. 802, 809 (1969).

[32] Especially probing review of a denial of access is appropriate when the government's justification for that denial has shifted repeatedly. Such vacillation suggests that the ostensible justifications are post hoc rationalizations. *See, e.g., Securities Indus. Ass'n* v. *Board of Governors of the Federal Reserve Sys.*, 104 S. Ct. 2979, 2983 (1984). In this case, the basis for petitioner Devine's initial, unsuccessful effort to expel legal defense funds was their incompatibility, not with the CFC, but with the President's budgetary priorities. The following year, the avowed impetus for Executive Order 12,404 was the desire to avoid "controversy" in the Campaign, and it was on that ground that the government defended the exclusion in the district court. In the court of appeals, the justification shifted to the government's professed wish to avoid "subsidizing" legal defense funds. *See* pages 8, 11-13, *supra*. In this Court, petitioner has shifted once again, now emphasizing the government's asserted right to direct contributions to so-called

Petitioner Devine's exclusionary action does not satisfy the reasonableness standard. Participation in the CFC by legal defense funds is entirely consonant with the functions of the federal workplace and with those of the Campaign itself. The attempted restriction of participation to so-called "traditional" charities represents an attempt to prevent federal workers from deciding which charities they wish to support through the CFC, imposing upon them instead petitioner's perception of "worthwhile" charities.

D. Participation by Legal Defense Funds Is Not Incompatible with the Forum

The essence of the reasonableness test, in Justice Powell's words, is whether there is "[s]ome basic incompatibility . . . between the communication and the primary activity of an area." *Greer* v. *Spock*, 424 U.S. at 843 (concurring opinion). Whether the forum here is viewed as the federal workplace or as the CFC itself, participation by legal defense funds is demonstrably compatible with it.

1. *Compatibility with the Federal Workplace*

Petitioner Devine insists that "[i]t is the workplace, and not the Campaign," that constitutes the relevant forum. (Pet. Br. 23-24 n.18.) Even if he is correct (contrary to the findings of both courts below), the focus of inquiry remains whether charitable solicitation by legal defense funds in the manner permitted by the CFC somehow is incompatible with the federal workplace. Petitioner cannot contend that charitable solicitation itself is incompatible with the federal workplace, for the purpose of the Campaign is to allow such solicitation. Instead, petitioner suggests that "expansion of the Cam-

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"traditional" charities. *See* Pet. Br. 29-34. In these circumstances, as the court below observed, a reviewing court must "be circumspect in evaluating conclusory statements by Government officials which do not comport with either the evidence in the record or common sense." Pet. App. 23a.

paign beyond its traditional scope tends to create morale problems and to divert some federal employees from their normal duties." (*Id.* at 39 n.31.)

Petitioner Devine points to no evidentiary support for this conclusory assertion. The court of appeals found no record evidence "to support the suggestion that work was disrupted when LDFs participated in the CFC in 1981 and 1982 . . . ." (Pet. App. 32a n.16.) Absent any evidence that participation by legal defense funds had caused disruption of the workplace or would do so in the future, the court below was "unwilling to defer to the fanciful—and somewhat specious—speculations offered by the appellant." (*Id.* at 32a (footnote omitted).)[33]

2. *Compatibility with the Purposes of the CFC*

Petitioner Devine's incompatibility argument focuses primarily upon the Campaign as the relevant forum. According to petitioner, the CFC is not a mere "clearinghouse" or "publicity and collection agent" for federal workers' contributions. Rather, it is a platform for the government to "determin[e] the focus of the charitable drive it sponsors," and an opportunity to direct employee contributions to "traditional charities" whose "goals" are deemed more "worthwhile" than those of legal defense funds. (Pet. Br. 32, 34-35, 48 n.39.)[34]

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[33] Petitioner asserts that the controversy caused by participation of legal defense funds necessitated "investments of extraordinary time and effort by those involved in the Campaign." Pet. Br. 39. The court of appeals correctly characterized this concern as "merely a post hoc rationalization for the exclusion of LDFs." Pet. App. 34a n.17. Moreover, petitioner has pointed to no evidence indicating that such "extraordinary" efforts interfered with the regular conduct of federal business. *See id.* Similarly, petitioner's assertion that "expansion of the Campaign beyond its traditional scope tends to create morale problems," Pet. Br. 39 n.31, is unsupported by the record. *See* Pet. App. 32a & n.16.

[34] The category of "traditional" charities, which figures so prominently in petitioner's brief, is nowhere mentioned in the Executive Order or implementing regulations. In fact, nothing in the history of the Campaign has attempted to define eligibility in terms of whether a charity is "traditional" or "nontraditional."

Petitioner's declaration that legal defense funds are less "worthwhile" than "traditional" health and welfare charities is both inaccurate and an improper basis for exclusion. *First*, the record in this case is replete with evidence that the respondents *do* provide health and welfare services; their litigation efforts have resulted in direct, tangible benefits to people all over the United States.[35] Petitioner never has disputed any of this record evidence. Unlike the "traditional" charities favored by petitioner, however, the respondents pursue their objectives by exercising the constitutional right to obtain judicial assistance in enforcing the laws that protect their clients. *See NAACP* v. *Button*, 371 U.S. 415, 429-31 (1963) ("[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion."). The Constitution does not permit petitioner to discriminate against the respondents because they exercise this right.

Second, petitioner's contention that "[t]here has long been a general understanding" of the distinction between

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[35] *See* J.A. 115-16, 120-22, 152-65, 221-27, 241-44, 245, 248-49, 251-54, 256-58, 259-60. Judge Gesell found in *NAACP-LDF I* that: "[L]awsuits by [the NAACP and Puerto Rican Legal Defense Funds] have provided millions of dollars in back pay and benefits, and invaluable other 'services' such as increased training opportunities, additional promotions, improved school programs, and better hospital facilities." 504 F. Supp. at 1368. The court of appeals in this case observed that the respondents "share the traits that have traditionally been considered critical in determining eligibility for the CFC . . . ." Pet. App. 21a. It noted that the respondents' litigation efforts served to enforce laws that "protect and aid the needy, as well as . . . protecting the health of society by promoting a clean environment." *Id.* at 25a n.13.

"traditional charities" and "advocacy groups" (Pet. Br. 31)—based upon the assertion that "[t]he United Way and similar federated charities . . . have consistently limited their membership to traditional health and welfare charities and have excluded other groups, such as advocacy groups like respondents" (Pet. Br. 33)—is inaccurate. Indeed, the United Way testimony relied upon by petitioner establishes the opposite proposition:

> "Historically, the United Way movement has always supported advocacy services by agencies for the purposes of furthering their health and welfare missions. From the beginning, United Ways helped fund settlement houses, family service agencies, public health organizations, and prisoner aid societies which led the struggle for better sanitation, better treatment of homeless children and the aged, and more humane treatment of prisoners.
>
> "*A large part of United Ways' own activities that now fall under the heading of planning began as community organization for health and welfare and involved advocacy from the start.*" [36]

Even a cursory review of organizations admitted to the United Way demonstrates that this umbrella organization regularly includes groups that litigate on behalf of selective "causes." For example, the brochure for the 1984 National Capital Area CFC lists among the United Way participants "University Legal Services," which provides "legal services to low-income persons with housing problems, enabling them to maintain control of their housing." (Resp. App. 61a.)

Not even direct participation in the CFC itself has been limited in the past to any sharply defined class of "traditional" charities. Over the years, the government

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[36] 1983 Hearing at 250 (statement of Jack Moskowitz, Senior Vice President, United Way of America) (emphasis added).

voluntarily has included in the Campaign such entities as the World Wildlife Fund, the Wilderness Society, and the United States Olympic Committee. (J.A. 427-28.) Such organizations perform valuable functions; but it is impossible to discern any principled differences between them and the respondent charities, in terms of health and welfare services, that would justify inclusion of one group and exclusion of the other.[37] The term "traditional" thus seems to have little meaning except to describe the charities of which petitioner approves.

Third, according to petitioner, it is not the fact that legal defense funds engage in litigation on behalf of others, as such, that renders them incompatible with the CFC. To the contrary, petitioner has declared that participation in the Campaign by legal aid societies—which also litigate on behalf of others—is entirely appropriate. (J.A. 20.) Participation by such litigation organizations is acceptable to petitioner because they purportedly select their cases "without a policy or practice of discrimination for or against the kind of cause" involved in the lawsuit. 5 C.F.R. § 950.101(a)(1)(i)(H) (1984). Yet this Court has held that litigation to advance a cause, far from being disreputable, is a constitutionally protected activity. *See NAACP* v. *Button*, 371 U.S. 415, 429-31 (1963).[38]

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[37] The government now dismisses inclusion of such environmental and recreational groups in the CFC either as a mistake (Pet. Br. 49) or as justifiable if only petitioner's lawyers had thought to include supporting material in the record (*id.* at n.40). These explanations miss the point. However substantial the activities of such organizations, their voluntary admission to the CFC belies petitioner's present contention that participation in the Campaign has been, and properly should be, limited to so-called "traditional" charities.

[38] Contrary to the assumption in the regulations, many legal aid societies, operating under severe budgetary constraints, are selective in the categories of cases they prosecute or defend on behalf of

Above all, petitioner Devine's characterization of the basic nature of the CFC is distorted. The Campaign was not designed to serve as a means for the government to direct donations to charities deemed "worthwhile" by government officials; nor was it created to promote what petitioner describes as "consensus" among government employees as to which charities are most deserving. Contrary to petitioner's assertions, the Campaign historically *has* been a "clearinghouse" or "publicity and collection agent." It is the individual contributors, not petitioner, who decide which charities are "worthwhile." [39]

Thus, there is no "incompatibility" between the purposes of the Campaign and participation in it by legal defense funds. The only issue is whether federal employees who believe that legal defense funds will help the needy in an effective manner should be free to designate those funds as their beneficiaries. If, as petitioner Devine asserts, there is "a greater consensus that the goals of [traditional charities] are worthwhile" (Pet. Br. 32), then employees who subscribe to that view may designate their contributions to other, more "traditional" charities of their choice, or they may simply make undesignated contributions, secure in the knowledge that their donations will be distributed only among "traditional" charities. Employees who do not share this purported "consensus" should be allowed to designate par-

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their clients. In any event, petitioner never explains why selectivity in *litigation* on behalf of health and welfare interests is bad, while many other health and welfare groups are admitted to the Campaign even though they are selective in pursuing their charitable purposes (*e.g.*, health research groups concerned only with certain illnesses).

[39] *See 1979 Hearings* at 30-31 (statement of Alan K. Campbell, Director, OPM) ("Our role is a supervisory policy role in relationship to what is essentially a decentralized money-raising effort . . . . [I]t is not for us to look internally as to how they allocate money voluntarily given by federal employees. Remember, we are talking about federal employees' money now, not tax money.").

ticular legal defense funds as their beneficiaries if they choose to do so.[40]

This Court rejected a similar attempt to restrain solicitation by certain charities based upon how they spend their revenue in *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980). There the Village barred door-to-door charitable solicitation by organizations that did not use at least 75 percent of their receipts for "charitable purposes." The Village reasoned that "any organization using more than 25 percent of its receipts on fundraising, salaries, and overhead is not a charitable, but a commercial, for-profit enterprise and that to permit it to represent itself as a charity is fraudulent." *Id.* at 636. But the Court refused to allow the Village to characterize such groups as noncharitable simply because the municipality disapproved of how they spent their receipts. "The Village, consistently with the First Amendment, may not label such groups 'fraudulent' and bar them from canvassing on the streets and house to house." *Id.* at 637 (footnote omitted). Justice White, speaking for the Court, emphasized that the organizations in question "are considered to be nonprofit, charitable organizations under both federal and state law." *Id.* at 637 n.10. The Court declined the dissent's invitation to articulate "how does one define a 'charitable' organization," *id.* at 644 (dissenting opinion). Likewise, the Court rejected the rationale that the prohibition was justified by "the community's collective desire to bestow

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[40] Petitioner suggests that participation by legal defense funds is undesirable because a particular group's efforts "might well be neutralized by those of another fund that supports an opposing view of where the public interest lies, so that no net 'benefit' would result from either group's activities." Pet. Br. 36 n.26. This newly advanced speculation is unsupported by the record and ignores the finding below that the respondents provide substantial health and welfare benefits to the public. This argument, which conveniently overlooks the social benefits that accrue from resolution of disputes through the judicial process, hardly justifies the respondents' expulsion.

its largess upon organizations that are truly 'charitable,' " *id.* at 645.

Just as in *Schaumburg*, where the Village sought to characterize as not "truly 'charitable' " those "advocacy-oriented" organizations with whose spending patterns it disagreed, the government here has labeled respondents "nontraditional" because of the manner in which they serve the needy. Here, as in *Schaumburg*, the disfavored organizations are deemed charitable for all other purposes by federal and state law. In *Schaumburg*, the Court refused to allow the Village to restrict contributions to "truly 'charitable' " groups, instead "leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses." *Id.* at 638. Here, too, the First Amendment requires that individual federal workers be allowed to decide whether their CFC contributions should go to "traditional" or "nontraditional" charities.[41]

E. Petitioner's Asserted Justifications for Expelling Legal Defense Funds Are Unreasonable

In addition to his preference for "traditional" charities, petitioner Devine asserts that expulsion of legal defense funds from the Campaign is necessary for three reasons: to remove "controversy" from the Campaign; to maintain government "neutrality" among competing advocacy groups; and to prevent "inundation" of the

[41] The specific exclusionary mechanism employed here is reminiscent of the 25-percent limitation struck down in *Schaumburg*. The regulations implementing Executive Order 12,404 exclude any organization that expends more than 15 percent of its budget on litigation on behalf of "the causes or policy goals that it supports." 5 C.F.R. § 950.101(a)(1)(v)(C), .101(a)(2) (1984). Thus, a group that engages in litigation may participate in the CFC if it spends 14.9 percent of its income on such activities, but not if it spends 15.1 percent. Such a quantitative limitation was most recently invalidated by this Court in *Secretary of State* v. *Joseph H. Munson Co.*, 104 S. Ct. 2839, 2854 (1984).

Campaign by too many participants. The evidence of record provides utterly no warrant for expelling legal defense funds from the Campaign on these grounds.

1. *Controversy*

The ostensible impetus for adoption of Executive Order 12,404 was the controversy allegedly engendered by legal defense funds' participation in the Campaign. Petitioner Devine's memorandum to the White House proposing the Order emphasized this controversy,[42] as did the OPM press release announcing the Order.[43] In the district court, petitioner defended the Order primarily on the ground that exclusion was necessary to remove controversy from the Campaign. *See* note 18 *supra*. In this Court, petitioner has downplayed, but not abandoned, the controversy justification. (Pet. Br. 36-41.) The controversy rationale is both factually and legally insufficient to justify the expulsion.

a. *Factual Inadequacy*

As a factual matter, petitioner Devine grossly exaggerates the extent and impact of the controversy. The AFL-CIO, for example, directed its constituent organizations *not* to boycott the CFC. It assured its members that "no undesignated funds will go to [the Right to Work Foundation]" and urged workers "not to designate the

[42] *See* J.A. 106 (justifying exclusion "[b]ecause of the problems caused by the participation of aggressive and controversial political and legal advocacy groups"). *Cf.* J.A. 269 ("the immediate genesis of the new executive order was the supposed 'controversial' nature of legal defense fund-type organizations").

[43] *See* J.A. 21 ("Devine also acknowledged the fierce opposition of Federal employee organizations and labor unions to the recent past inclusion of advocacy groups in the CFC. . . . Devine added, 'We asked the Federal workers to stay with the campaign and to give us one year to clean it up. They kept their part of the bargain, and now President Reagan has fulfilled our promise.' ").

[Foundation] as the recipient of any of their CFC contributions." (J.A. 91-93.)

More important, the alleged controversy has had no discernible impact upon the success of the Campaign. Contributions have increased substantially every year that legal defense funds have participated, as the following chart demonstrates: [44]

Campaign Year	Total Contributions	Increase Over Previous Year	Designated Funds
1981 (Fall 1980)	$ 87,051,770	5.1%	45.9%
1982 (Fall 1981)	94,659,485	8.7	49.5
1983 (Fall 1982)	101,165,247	6.9	62.7
1984 (Fall 1983)	109,274,248	8.0	66.9

No legal defense funds participated in the 1981 Campaign; several participated in the 1982 Campaign; and all of the respondents (as well as the National Right to Work Foundation) participated in the 1983 and 1984 Campaigns. Petitioner's assertions notwithstanding, participation by legal defense funds has not hurt the CFC at all. The most significant change during these years, as the chart demonstrates, has been a dramatic increase in the ratio of designated to undesignated contributions. Many more federal employees have decided to specify which charities should receive their contributions.

Petitioner asserts that the rate of employee participation in the CFC declined between the 1982 and 1983 Campaigns, and he attributes this to the controversy caused by legal defense funds' participation in the CFC. (Pet. Br. 38.) That assertion is erroneous. Although the

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[44] The data in this chart for the 1981 Campaign are based upon an affidavit submitted by petitioner below, J.A. 430; for the 1982 and 1983 Campaigns, upon CFC Memorandum No. 83-15 (OPM Nov. 28, 1983), *reprinted in* Resp. App. 55a-57a; and for the 1983 and 1984 Campaigns, upon OPM tabulations for the 1984 (Fall 1983) Campaign, dated October 15, 1984. These tabulations are contained in a printout entitled "Fall 1983 Combined Federal Campaign Results" (Oct. 15, 1984) [hereinafter cited as *"Fall 1983 Results"*]. Counsel for respondents have lodged a copy of this document with the Clerk of the Court.

preliminary data contained in the record indicated a slight decline in participation (from 64.7 percent to 63.2 percent), OPM's final figures demonstrate that employee participation in the 1983 Campaign actually *rose* by three percentage points (to 67.65 percent).[45] Thus, the "controversy" that allegedly infected the 1983 CFC did not diminish the total amount of contributions or the level of participation.

Moreover, despite the assertedly controversial character of legal defense funds, many federal employees have chosen to make contributions to them. The respondents have received substantial sums of money from the Campaign, all in the form of designated contributions. The organizations received about $350,000 from the 1983 Campaign in the National Capital Area alone, and an estimated $2 million nationwide. During the 1982 and 1983 Campaigns, the NAACP Legal Defense and Educational Fund received over $525,000 from thousands of donors in over 130 localities. Even the group at the center of the "controversy"—the Right to Work Foundation—received $30,000 in designated funds in the Washington, D.C. area alone. (J.A. 51-52, 228, 234-35.)[46]

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[45] *See* CFC Memorandum No. 83-15 (OPM Nov. 28, 1983), *reprinted in* Resp. App. 56a. We understand that, subsequent to that memorandum, OPM revised its method of calculating the participation rate by enlarging the universe of employees deemed eligible to participate. Thus, revised participation rates for the 1983 and later Campaigns cannot be compared to those for earlier Campaigns, as to which no such adjustment was made.

[46] In the 1984 Campaign, the "National Service Agencies" (the administrative grouping that contains the legal defense funds, among other participants) received $8,222,000 in designated contributions—a 17 percent increase over the 1983 Campaign. Eleven percent of all designated funds were donated to National Service Agencies. *See Fall 1983 Results*, Tables 2, 4.

b. *Legal Inadequacy*

As a matter of *law*, petitioner Devine's exclusionary action could not properly be based upon controversiality, even if it were shown to exist. In effect, petitioner has declared that if a vocal group of federal employees or competing charities dislike a particular organization, they can force that organization out of the CFC, thereby preventing other employees from directing their Campaign contributions to it. If the Director of OPM shares this dislike of the organization, or fears any public debate, then the disfavored charity will be branded "controversial." The reason for the protesters' opposition to the targeted organization is irrelevant. Under petitioner's rationale, if a group of employees protested participation by the NAACP Legal Defense and Educational Fund based on their dislike of blacks and other minorities, OPM lawfully could exclude the Fund from the CFC—not because OPM necessarily agreed with the protesters, but merely "to avoid controversy." [47]

This Court consistently has refused to allow the government to silence a controversial speaker in order to avoid offending or antagonizing a hostile audience.[48] The

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[47] This is not an unrealistic hypothetical. One of the letters upon which petitioner relied in expelling legal defense funds warned against admitting "groups that stir up negative feelings because of religious . . . affiliation." J.A. 370-71.

[48] *See, e.g., Bolger* v. *Youngs Drug Prods. Corp.*, 103 S. Ct. 2875, 2883 (1983) (" 'we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression' "); *Coates* v. *City of Cincinnati*, 402 U.S. 611, 615 (1971) ("Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms"); *Street* v. *New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"); *Cox* v. *Louisiana*, 379 U.S. 536, 551 (1965) (" 'constitutional rights may not be denied simply because of hostility to their assertion or exercise' "); *Terminiello*

Court articulated the rationale for these cases in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). There it invalidated a rule barring students from wearing antiwar armbands in school (plainly a *non*public forum during class hours in at least certain respects). The school officials had sought to justify the ban on the basis of their "urgent wish to avoid the controversy which might result from the expression . . . of opposition to this Nation's part in the conflagration in Vietnam." *Id.* at 510 (footnote omitted). The Court rejected that justification:

> "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . ; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."

Id. at 508-09.

More recently, the Court confronted the "controversy" justification in *Consolidated Edison Co. of New York, Inc.* v. *Public Service Commission*, 447 U.S. 530 (1980). There the Court overturned a ban on the insertion of statements on "controversial" subjects in the utility's bills to its customers:

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v. *City of Chicago*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging.").

> "[C]ustomers who encounter an objectionable billing insert may 'effectively avoid further bombardment of their sensibilities simply by averting their eyes.' . . . The customer . . . may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket."

Id. at 542 (citation omitted; footnote omitted). *Accord, Bolger* v. *Youngs Drug Products Corp.*, 103 S. Ct. 2875, 2883 (1983). Surely, the home of a utility's customers, where the billing inserts are received and the utility's message is heard, is as nonpublic as a place can be. But, petitioner's argument notwithstanding, the nonpublic character of the homes in *Consolidated Edison* did not preclude application of the Court's longstanding protection of First Amendment interests.[49]

Here, as in *Consolidated Edison*, simple remedies are available to any federal employee who may be offended by the participation of legal defense funds in the CFC: he may designate his contribution to go exclusively to groups he likes, as OPM actively encourages him to do (J.A. 84-86); or he may leave his contribution undesignated, without fear that any portion of it will go to the groups he disfavors.

The increase in total donations in the 1983 CFC was accompanied by a 25 percent increase in the proportion of designated contributions. (J.A. 430.) In the OPM press release that accompanied Executive Order 12,404, petitioner Devine recognized the role played by designated contributions in defusing the purported hostility to legal defense funds:

> "Devine also acknowledged the fierce opposition of Federal employee organizations and labor unions to

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[49] *See also F.C.C.* v. *League of Women Voters*, 104 S. Ct. 3106, 3120 (1984) (invalidating congressional restriction of editorializing by noncommercial broadcasting stations on " 'controversial issues of public policy' ").

> the recent past inclusion of advocacy groups in the CFC. 'Sentiment favoring a wholesale boycott of the CFC was strong this last year,' he said, 'but the forbearance of Federal workers was heartening. *Most workers still contributed to the campaign, but earmarked their donations for specific charities, thereby avoiding the possibility that their gifts would go to unwanted recipients.*' "

(J.A. 21 (emphasis added).)

Final recognition of the legal inadequacy of petitioner's controversy justification comes from his own General Counsel, who acknowledged a few weeks before Executive Order 12,404 was adopted: "An organization which meets the published eligibility criteria cannot, under the First Amendment to the United States Constitution, be excluded from participation in the CFC simply because it is controversial." (J.A. 432.)

2. *Neutrality*

Petitioner Devine next asserts that expulsion of legal defense funds is necessary "to preserve government neutrality among groups with competing public policy views." He contends that admission of a particular organization "is unlikely to be perceived as a neutral act in view of the government's active sponsorship of the Campaign as a whole." (Pet. Br. 43.)

Executive Order 12,404 does not preserve government neutrality: it destroys it. Prior to promulgation of the Executive Order, the government was in fact neutral among "groups with competing public policy views." So long as would-be participants met the content-neutral national eligibility criteria, they could participate in the Campaign. It was the individual contributors, not the government, who chose among the competing charities. In expelling legal defense funds, however, petitioner has declared that "traditional" charities somehow are more "worthwhile" than organizations that serve health and

welfare purposes by resort to the judicial system. (Pet. Br. 32.) He has barred federal employees from designating their CFC contributions to go to legal defense funds, based upon his belief that such organizations are unworthy of support. This official preference for particular types of charities is the antithesis of neutrality.[50]

This Court rejected a much more plausible neutrality claim in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). There one of the justifications for denying student religious groups access to university buildings was that such access supposedly would confer an "imprimatur of state approval on religious sects or practices." *Id.* at 274. The Court rejected that argument: "University students are, of course, young adults. They . . . should be able to appreciate that the University's policy is one of neutrality toward religion." *Id.* at 274 n.14. Presumably federal workers are as able as college students to grasp the principle of official neutrality.[51]

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[50] Petitioner's neutrality justification is especially ironic in light of his persistent opposition to participation in the Campaign by Planned Parenthood:

> "Everyone knows where I [Director Devine] stand in regard to the kind of practices that Planned Parenthood does. You promote abortion; I think that's detestible [*sic*]. I think in a just world you'd have nothing to do with a charitable drive." Pet. App. 30a.

[51] The government itself has recently rejected a similar neutrality argument in Brief of the United States as Amicus Curiae in *Board of Trustees of the Village of Scarsdale* v. *McCreary*, No. 84-277, at 13:

> "To accept petitioners' premise that religious (and other forms of controversial) symbolic speech must be excluded from public parks because of the danger that some observers may infer a government endorsement of the message would convulse modern First Amendment law. It would mean . . . that the only ideas that could be communicated on public land are orthodox ideas: those 'wrapped in the shared and approving sentiments of the community.' "

To preserve both the appearance and the reality of government neutrality, petitioner Devine has at his disposal an option far more reasonable than the wholesale expulsion of legal defense funds: he can include in the CFC brochure as clear and strong a disclaimer of governmental endorsement of participating organizations as he chooses.[52] This Court recently approved such an approach in *F.C.C.* v. *League of Women Voters*, 104 S. Ct. 3106 (1984). There the government sought to justify its prohibition of editorializing by noncommercial educational broadcast stations on the ground that it was necessary to "ensur[e] that the audience . . . will not be led to think that the broadcaster's editorials reflect the official view of the government." *Id* at 3125. The Court rejected this justification, observing that Congress could have required a disclaimer stating that the editorial "does not in any way represent the views of the Federal Government." Explained the Court:

> "Such a disclaimer—similar to those often used in commercial and noncommercial programming of a controversial nature—would effectively and directly communicate to the audience that the editorial reflected only the views of the station rather than those of the government."

Id. at 3125-26.[53]

3. *Inundation*

Petitioner Devine also contends that the decision below would lead to inundation of the CFC by so many groups that the Campaign could not continue to function. (Pet.

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[52] The district court found that a disclaimer "would be sufficient to convey the government's desire not to endorse the making of contributions to any particular organization." Pet. App. 94a.

[53] *See also Widmar* v. *Vincent*, 454 U.S. 263, 274 n.14 (1981) (rejecting concern over appearance of nonneutrality, because "[t]he University's student handbook already notes that the University's name will not 'be identified in any way with the aims, policies, programs, products, or opinions of any organization or its members' ").

Br. 16, 48 n.39.) Petitioner's fear of inundation is illusory in two respects.

First, the number of organizations expelled from the Campaign by Executive Order 12,404 is miniscule. According to petitioner Devine's Congressional testimony:

> "I do not suspect that many groups that are presently eligible in the Campaign would not be eligible under our proposal. . . . [T]here will be very little impact in terms of numbers on those eligible. . . . It is going to have an impact [on the number of charities], but in terms, let's say, of 500 current participants in the Washington, D.C. area, we may be talking about ten or something like that; and in terms of percentage in [the Campaign], it would be very small."

1983 Hearing at 176-77.

Second, contrary to petitioner Devine's assertion (*e.g.*, Pet. Br. 48 n.39), the judgments of the courts below do *not* require admission to the Campaign of all charitable organizations that qualify for a tax exemption under Section 501(c)(3) of the Internal Revenue Code. The court of appeals held only that because some legal defense funds do in fact perform health and welfare services, their blanket exclusion from the CFC was improper. (Pet. App. 42a; *see id.* at 98a-99a.) Petitioner Devine remains free to impose reasonable restrictions on participation in the CFC, including, for example, the valid national eligibility criteria that he gratuitously abandoned after the court of appeals decision. *Cf. Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648-49 (1981) (upholding content-neutral restrictions on number of organizations permitted to solicit).[54]

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[54] Even admission of all litigating groups would not inundate the CFC. Although petitioner is correct that the IRS lists some 300,000 Section 501(c)(3) charities, Pet. Br. 48 n.39, its most recent survey of charities (based upon analysis of 1975 returns) reported that there were only 40 groups in the category of "litigation" other than legal aid. By contrast, over 30,000 groups come within the "traditional" health and welfare categories. *See IRS Statistics of Income Bulletin* No. 2, Table 2, at 11-16 (Fall 1981).

F. No Adequate Alternative Means of Solicitation Are Available to the Excluded Organizations

Finally, petitioner Devine argues that the expulsion of legal defense funds from the Campaign should be upheld because "alternative channels of communication are available" to them. (Pet. Br. 44.) He suggests that the respondents could "solici[t] contributions directly from federal workers outside the workplace," for example by "direct mailings" or "fund-raising rallies." (*Id.*) Such proposed alternatives are palpably inadequate substitutes for participation in the Campaign.

As petitioner acknowledges, "[a]ll organizations that wish to receive funds solicited in the federal workplace must do so within the framework of the Campaign." (Pet. Br. 3-4.) All other charitable solicitation in the workplace is barred. Three features of the Campaign render it qualitatively superior to any alternative means of fundraising among federal workers.

First, the solicitation occurs as part of a coordinated, highly publicized, government-wide fundraising drive.[55] Every fall, the local Campaigns focus employee attention on contributing to participating charities. This results in a synergy that would be missing from any individual solicitation.

Second, the CFC is efficient. Because of the consolidated fundraising effort, and the direct focus on an identifiable group (federal workers), the Campaign's administrative costs (which are borne by participating orga-

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[55] *See* 5 C.F.R. § 950.521 (1984) (regulations governing campaign and publicity materials).

nizations[56]) are low—about four percent.[57] The Campaign enables participating organizations to minimize their fundraising expenses and thereby to maximize the use of contributions for their charitable activities.

Third, the CFC allows participating charities to receive their contributions through payroll deductions from contributing employees.[58] Rather than write a single check for a large amount, federal employees may donate by means of periodic deductions of smaller amounts. This is an important element in the CFC's fundraising success.[59]

Petitioner Devine notes that in some cases this Court has pointed to the availability of alternative channels of communication as an element in denying access to a nonpublic forum. (Pet. Br. 45.) But in such cases the alternative channels were reasonable substitutes. In *Perry*, for example, the union that was denied access to the school mailboxes nevertheless had ample alternative means of communicating with teachers—including in-school bulletin boards and meeting facilities. 460 U.S. at 53. Here, by contrast, the proposed alternatives are so different from, and inferior to, participation in the Campaign that they do not constitute reasonable alternatives. In such circumstances, this Court consistently has rejected the "alternative channels" argument.[60]

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[56] *See id.* § 950.519(b) (administrative costs must be deducted prior to distribution of contributions).

[57] In the 1983 (Fall 1982) CFC, total costs for all the local Campaigns were four percent of total receipts. CFC Memorandum No. 83-15 (OPM Nov. 28, 1983), *reprinted in* Resp. App. 57a.

[58] *See* 5 C.F.R. § 950.523 (1984) (authorizing payroll withholding).

[59] Eighty-nine percent of all receipts in the 1984 CFC were contributed through the payroll deduction process. *See Fall 1983 Results*, Table 3.

[60] *See, e.g., Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 556 (1975) (private theaters would not have been adequate alternative to public theater from which plaintiff was excluded, "since none apparently had the seating capacity, acoustical features, stage equipment, and electrical service that the show required"); *Healy* v. *James*, 408 U.S. 169, 183 (1972) (rejecting facilities outside campus as adequate alternative to campus meeting facilities for student groups, in light of "the practical realities").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 84-312

IN THE
Supreme Court of the United States
October Term, 1984

DONALD J. DEVINE, Director, Office of Personnel Management,

Petitioner,

v.

NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY, INDEPENDENT SECTOR, THE NATIONAL BLACK UNITED FUND, THE AMERICAN JEWISH CONGRESS, AND THE PUBLIC CITIZEN FOUNDATION

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INTERESTS OF *AMICI CURIAE*

This brief *amicus curiae* is submitted on behalf of the National Committee for Responsive Philanthropy, Independent Sector, the National Black United Fund, the American Jewish Congress, and Public Citizen Foundation, in support of the respondents NAACP Legal Defense and Education Fund, Inc., *et al.*

The *amici* are public charities as defined by the Internal Revenue Code, 26 U.S.C. § 509, and rely on public support to sustain their activities. Although diverse in their charitable aims, the organizations participating as *amici,* or their members, engage in substantial litigation, lobbying or public education as a means of advancing their charitable goals. Thus, they are all either directly or potentially threatened by the exclusion of advocacy groups imposed by the Executive Order. As a result, they are either currently ineligible to participate in the Combined Federal Campaign ("CPC") or their eligibility may well be jeopardized in the future.[1]

Amicus National Committee for Responsive Philanthropy ("NCRP") represents the interests of its members and other charitable organizations whose efforts are intended to promote social, economic and political justice. Its members include groups involved in a wide range of activities addressing health, social welfare, housing, neighborhood revitalization, civil rights, equal employment opportunities, environmental protection, and consumer issues. NCRP is funded primarily through foundation and corporate contributions, and has not sought to participate in the CFC. However, at least one-third of the NCRP's member organizations seek to raise

[1]Eligibility to participate in the CFC historically has been restricted to charities that serve public health and welfare functions. As the lower courts found, respondents and similar organizations, such as *amici,* plainly fall within the category of health and welfare charities. Because that limitation is not challenged by respondents, references in this brief to charitable organizations include only those organizations that promote public health and welfare, and would therefore not include other types of charities, such as art groups, colleges, sporting clubs, or fraternal organizations.

funds and promote their organizational objectives through the CFC.[2]

Amicus Independent Sector is a broad-based coalition of 595 member and affiliate organizations founded in 1980 to preserve and enhance this Nation's tradition of giving, volunteering, and not-for-profit initiatives. Independent Sector includes many of the major philanthropic and voluntary organizations in this country, and has frequently participated in litigation before this Court involving regulation of charitable organizations. *See State of Maryland v. Munson,* 104 S. Ct. 2839 (1984); *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980). Independent Sector is concerned, however, that acceptance of petitioner's position in this case would lead to the exclusion of some of its members from the CFC, solely because they engage in litigation, lobbying or public education activities to promote their charitable goals.[3]

Amicus National Black United Fund, Inc. is an organization comprised of affiliated groups throughout the

[2]NCRP member organizations currently participating in the CFC, but whose eligibility is threatened by the advocacy restrictions imposed by the Executive Order, include the Black United Fund of New Jersey, Aid to Wisconsin's Organizations, the Children's Foundation, the Detroit Black United Fund, the Food Research and Action Project, the Gray Panther Project Fund, NOW Legal Defense and Education Fund, the Native American Rights Fund, the Philadelphia Project on Occupational Safety and Health, the Women's Fund of Greater Washington, and the Vietnam Veterans of America Foundation.

[3]Independent Sector acts in this matter through its board of directors; its joining this brief does not imply that each of its member organizations has taken a position on the questions presented here.

country, which were organized to provide financial support to various programs benefiting the Black community. Among other projects, the National Black United Fund and its affiliates support programs concerning economic development, health and welfare, social justice, legal assistance, and alternative education. Each of the National Black United Fund's affiliates is, at present, participating in the CFC, and each desires to continue to participate. However, in light of their support of litigation and public education programs, the eligibility of the Fund's affiliates to continue to participate in the CFC would be jeopardized if the petitioner prevails in this litigation.

Amicus American Jewish Congress is a national organization that has worked for over sixty years to secure the civil rights and civil liberties of the American Jewish community and Jews throughout the world. It has engaged in litigation, lobbying and public education campaigns in its efforts to combat anti-Semitism, social injustice, mistreatment of Soviet Jewry, and government entanglement with religion. While the American Jewish Congress has not sought to participate in the CFC to date, it is concerned that the opportunity to participate in the future will be foreclosed if petitioner's position is upheld.

Amicus Public Citizen Foundation is a Washington-based organization founded to support the educational activities of Public Citizen, which for over a decade has been involved in a wide range of activities on behalf of consumers, including research and public education on health and safety issues, lobbying for legislative reform, and litigation on a broad spectrum of health and safety issues. Under the district court's order in this case, Public Citizen Foundation has been permitted to participate in the CFC, and it desires to continue to do so. However, given Public

Citizen's advocacy activities, which the Foundation supports, the Foundation might be denied access to the CFC in the event petitioner prevails.

Despite their diversity, the charitable organizations that have joined together to file this brief share a common concern. In their view, the restrictions imposed by Executive Order 12,404, which exclude from the CFC charitable organizations that engage in litigation, lobbying or public education as a means of advancing their charitable goals, violate the First Amendment and cannot stand.

Amici are also concerned about two features of the petitioner's position which are not only critical to the resolution of this case, but which have far broader implications. First, *amici* urge the Court to reject the petitioner's contention that the CFC is a "non-public" forum, and thus decisions to exclude various charitable groups must be sustained whenever the petitioner can point to a "reasonable" justification for the exclusion. The CFC is at least a limited public forum. Indeed, it was established solely to provide a forum for communications between charitable organizations and government employees. Millions of federal employees depend on the CFC as their principal source of information about charities and their main vehicle for making charitable contributions. Therefore, given the role the CFC plays and its critical importance to both participating charities and federal employees, the CFC is a limited public forum. Accordingly, the petitioner's decision to exclude certain charitable organizations from the CFC must be subjected to careful scrutiny.

Second, the Court should reject the petitioner's rationale for excluding advocacy groups. The petitioner's attempt to draw a distinction between "traditional" charities and charities that engage in advocacy is outmoded and unten-

able. Although it is the cornerstone of the petitioner's case, he nowhere explains the grounds for his conclusion that there is a constitutionally sound basis for differentiating between an organization that, for example, provides food for the hungry, and one that engages in litigation or a public education campaign to expand the scope of the food stamp program. The charitable goal – ensuring that the hungry are fed – is precisely the same; only the means differ. Moreover, excluding organizations on the ground that advocacy may stir up controversy strikes at the core of the First Amendment, particularly where the litigation, lobbying and public education activities identified by the petitioner as provoking the controversy are fully protected by the Constitution.

STATEMENT

The history of the CFC, and of the evolution of the eligibility requirements at issue in this case, are set forth in the brief of respondents and will not be repeated here. Moreover, because respondents' brief will present a comprehensive rebuttal to the arguments advanced by the petitioner, *amici* join in the arguments made by respondents rather than attempting to restate all of respondents' arguments. *Amici* believe, however, that it is worthwhile to file this brief in order to focus the Court's attention on several issues which have critical importance, and which may not stand out in respondents' comprehensive point-by-point refutation of the petitioner's claims.

ARGUMENT

Introduction And Summary Of Argument

There can be no dispute that the solicitation of funds by charitable organizations is "within the protection of the First Amendment." *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 632 (1980); *State of Maryland v. Munson,* 104 S. Ct. 2839 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Petitioner does not contest this settled doctrine. Rather, the linchpin of the petitioner's case is his contention that the CFC must be deemed to be an indistinguishable component of a non-public forum – the federal workplace – and thus his decision to exclude from the CFC all charitable organizations that engage in significant advocacy activities is immune from searching scrutiny by this Court. Indeed, according to the petitioner, his decision must be sustained so long as it can be viewed as a "reasonable" one. In so arguing, the petitioner appears to concede that his exclusion of advocacy groups could not pass muster if subjected to the heightened level of scrutiny applicable in public forum and limited public forum cases.

As we demonstrate below, neither component of the petitioner's argument is well-grounded. In the first place, the petitioner's analysis of the relevant forum is flawed; there is no support for the petitioner's contention that the federal workplace – rather than the CFC – is the forum at issue. The CFC is plainly a forum in its own right, and it should be the focus of the Court's inquiry. Moreover, under the Court's analysis in *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 378 (1983), it is clear that the CFC is a limited public forum, and therefore petitioner's exclusionary criteria must be measured under the strict standard of scrutiny required by the First Amendment.

In any event, judged by any standard, the petitioner's decision to exclude virtually all charitable organizations engaging in substantial advocacy is far from reasonable. On the contrary, the distinction urged by the petitioner between "traditional charities" and charities that engage in

advocacy distorts the essential nature and history of charitable activity, imposes a content-based restriction, and punishes charities for engaging in constitutionally protected activities, such as litigation and public education. Accordingly, the exclusion cannot stand.

I. THE CFC IS A LIMITED PUBLIC FORUM.

The starting point for any analysis of the nature of the forum at issue here must be *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37 (1983). There, this Court refined the analysis it had employed in the past for assessing whether a forum was "public" in nature. After canvassing its prior decisions, the Court concluded that there are three categories of forums – traditional public forums, limited public forums, and non-public forums. The Court stated that "[a]t one end of the spectrum are streets and parks," which are "quintessential public forums." 460 U.S. at 45. For these traditional public forums, access restrictions may be sustained only if they meet the most exacting demands of the First Amendment.

The Court further observed that "[a] second category consists of public property which the State has opened for use by the public as a place for expressive activity." For these "limited public forums," the Court emphasized that the "Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." *Id.* at 45 (citations omitted). The Court went on to note that while the State was not bound to retain the open character of the limited public forum, "as long as it does so it is bound by the same standards as apply in the traditional public forum." *Id.* at 46.

Finally, the Court identified a third category – "[p]ublic

property which is not by tradition or designation a forum for public communication." *Id.* For non-public forums, restrictions can be imposed provided that they are "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

Perry is instructive for two reasons. First, it refutes the petitioner's suggestion that the relevant focus should be on the federal workplace, as opposed to the CFC itself. Second, it demonstrates that the CFC is a limited public forum, not a non-public forum, as the petitioner contends.

1. In arguing that the CFC is a non-public forum, the petitioner relies heavily on his assertion that the federal workplace, and not the CFC, is the relevant forum. According to the petitioner, the CFC "is an activity that takes place in the federal workplace. It is the workplace, and not the Campaign, to which respondents ultimately seek access." Pet. Br. at 23 n. 18 (citations omitted). The petitioner's argument is flawed in many respects, and wholly ignores the analysis employed by the Court in *Perry*.

To begin with, there is no merit to the petitioner's suggestion that respondents, *amici,* or other charitable organizations are seeking access to the federal workplace. Had the federal government not established and sponsored the CFC for the past two decades, this case would not have arisen. To *amici*'s knowledge, charitable organizations have never claimed that there is an unbridled, constitutionally protected right to be admitted to the federal workplace to inform federal workers of their activities or to solicit contributions. Indeed, it was to provide charitable organizations with a stable, formalized means of access to the federal workplace that the government – in an effort to stimulate charitable contributions by

federal workers — created the CFC. Through the establishment of the CFC, the government forged a regular channel by which charities could inform federal workers about their activities, and federal workers, once so informed, could decide which organizations they wished to support. Thus, it is the CFC — and not the federal workplace itself — to which respondents, *amici* and other charities seek access.

Nor has the petitioner even attempted to offer an explanation as to why the CFC is not a forum in its own right. The CFC is more than merely an "activity." On the contrary, it has all the attributes of a forum. Thus, the CFC provides a stable mechanism for the regular exchange of information, as does a magazine, a newspaper, or an established university forum, and it has served this function for decades. Through the CFC, federal employees are provided specific information about the activities of participating charities and support the organizations they choose through contributions. In this respect, the CFC is no different from the university meeting facilities at issue in *Widmar v. Vincent,* 454 U.S. 263 (1981), the school board meetings at issue in *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167 (1976), or the municipal theater at issue in *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975), all found to be limited public forums.

Perhaps most importantly, the petitioner entirely overlooks the Court's analysis in *Perry*. There the Court examined whether the School District's mail system constituted a public or non-public forum. Just as in this case, the Court was confronted with two alternative views of the appropriate forum — the mail system itself, or the broader forum of the school, the school building, or the entire School District. Without addressing the question, the

Court focused its inquiry solely on the mail system, taking the view that the mail system itself, which is analogous to CFC, constituted the relevant fourm. No member of the Court suggested that the majority had looked at the wrong forum. There is no reason for departing from the approach taken in *Perry* here.

2. When appropriately analyzed under *Perry,* it is clear that the CFC is a limited public forum.[4] As the Court described in *Perry,* a limited public forum "consists of public property which the State has opened for use by the public as a place for expressive activity." 460 U.S. at 46. This definition could hardly fit the CFC more precisely. The government founded the CFC for a single purpose: to establish a stable channel of communication between charities and federal workers. Not only was the CFC "opened up for use by the public for expressive activity," but it was created solely for that purpose and has served that purpose for the past two decades. Indeed, the CFC's only function is to provide a means by which charities can engage in the expressive activity of informing federal employees of their activities, and federal employees can engage in the expressive and associational activity of providing financial support for charities they deem worthwhile.

A comparison of the Court's prior cases involving limited public forums and non-public forums strengthens *amici*'s position that the CFC is a limited public forum. The principle that ties the non-public forum cases together is that in each case the forum was "not by tradition or

[4]Although the court of appeals found it unnecesary to resolve the question of the nature of the CFC as a forum, the district courts that have considered the question have concluded that the CFC is a limited public forum. *See* Pet. App. at 19a; *see also NAACP Legal Defense and Education Fund v. Campbell,* 504 F. Supp. 1365, 1367 (D.D.C. 1981).

designation a forum for public communication." *Perry*, 460 U.S. at 46. Applying that standard, the Court noted that prisons, military bases, municipal transportation systems, and postal mailboxes were non-public forums. *Id.* at 46, *citing Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), and *Adderley v. Florida*, 385 U.S. 39 (1974) (prisons); *Greer v. Spock*, 428 U.S. 828 (1976) (military bases); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (municipal transportation systems); and *United States v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) (postal mailboxes). In sharp contrast, by both tradition and designation, the CFC has served as a forum for public communication. Indeed, it has served no other function.[5]

[5]Although the Court in *Perry* ultimately ruled that the school's mail system was a non-public forum, the decision in *Perry* supports, not undercuts, *amici's* argument. In *Perry*, a rival union challenged a collective bargaining agreement between the school district and the teachers' exclusive bargaining representative which gave the bargaining representative, but no other labor organization, access to the school district's internal mail facilities. The Court found that, in providing access solely to the certified union, the school district had not granted "access as a matter of course" to all who sought to distribute material, and thus had not created a public forum. On the other hand, the Court went out of its way to limit the reach of its holding. Recognizing that the school mail facilities had been used on occasion by certain groups of interest to students, such as the Cub Scouts and the YMCA, the Court expressly observed that the mail system might be a "limited public forum" for "other entities of similar character." 460 U.S. at 48. The CFC stands on precisely the same footing. It has been used for years by charities similarly situated to respondents and *amici*, and hence it is a limited public form at least insofar as health and welfare charities are concerned.

In this crucial respect, the CFC is far closer to the cases cited by the Court in *Perry* as exemplifying the limited public forum. Thus, this case bears substantial resemblance to *Widmar v. Vincent*, where the "forum" was a state university's meeting facilities. There, the Court observed that although the university was under no compulsion to do so, it had historically permitted student groups to use the meeting facilities, thereby creating a limited public forum. Accordingly, the Court held that as long as the university maintained its policy, the university could not exclude groups absent a compelling state interest. 454 U.S. at 269-70. *See also Madison Joint School District No. 8 v. Wisconsin Employment Relations Comm'n*, *supra*, 429 U.S. at 175 (state not required to conduct business in open session, but where it has opened up a forum for public involvement, exclusions bear a heavy burden of justification); *Southeastern Promotions Ltd. v. Conrad*, *supra*, 420 U.S. at 555-559 (because municipal theater was a public forum, city could not exclude a particular production without satisfying strict standards applicable to prior restraints).

Here, just as in *Widmar*, *Madison Joint School District*, and *Southeastern Promotions*, the government had no obligation to create the CFC. However, once it found a need for such a forum, created it, and regularly granted many health and welfare charities access to it, the government surrendered its right to deny similar charities access to the CFC. As the Court stressed in *Perry*, as long as the government maintains the CFC, "it is bound by the same standards that apply in the traditional public forum." 460 U.S. at 46. Thus, in order to uphold the exclusion of advocacy groups, the petitioner bears a heavy burden of justification — a burden he has not even attempted to

shoulder in this case. Accordingly, the exclusion cannot stand.[6]

II. REGARDLESS OF THE STANDARD APPLIED, THE EXCLUSION OF ADVOCACY GROUPS FROM THE CFC CANNOT BE SUSTAINED.

Under *Perry*, "the touchstone for evaluating . . . distinctions [in access to non-public forums] is whether they are reasonable in light of the purpose which the forum at issue serves." 460 U.S. at 49. Even judged by this "reasonableness" standard, the petitioner's exclusion of advocacy groups from the CFC cannot pass muster.

To demonstrate that his decision is reasonable, the petitioner argues that there is a recognized distinction between "traditional charities, particularly those that provide basic health and welfare services to the needy," and "other types of organizations," such as those that engage in advocacy. Pet. Br. at 31. With this premise as the cornerstone of his argument, the petitioner then points to three justifications

[6]The petitioner has argued that the eligibility requirements the CFC has operated under in the past have so limited access that the CFC was never "public" in nature. However, that argument flies in the face of the factual findings of the courts below, which found that the respondents and similar charities such as *amici* are virtually identical in status to the charitable organizations that have participated in the CFC in the past. Indeed, the court of appeals expressly noted that "both in terms of their longstanding treatment under the tax code and the parameters for the CFC as it has traditionally been understood, the status of [respondents] and included charities is virtually identical." Pet. App. 22a. Thus, the court of appeals concluded that, under the prior standards, respondents, as well as other charitable organizations which promote health and welfare, would have been eligible to participate in the CFC. *Id.* For that reason, it is clear that the CFC qualifies as a limited public forum for health and welfare charities.

for excluding "non-traditional" charities: (a) that the inclusion of controversial groups, especially those that engage in litigation, would threaten the success of the CFC; (b) that permitting advocacy groups to solicit through the CFC suggests that the government somehow endorses the position of the charity, which might lead to the perception of the politicization of the CFC; and (c) that there are alternative channels for excluded charities to communicate with federal workers.

We demonstrate below that each of the specific justifications proffered by the petitioner is not only unreasonable, but offends the First Amendment and should be rejected. However, it is important to understand first that the purported distinction between "traditional" and non-traditional charities is baseless, and has already been soundly rejected by this Court.

Although the petitioner claims that there is an historical distinction between traditional and non-traditional charities, he never identifies the source of the purported distinction or instances in which it has been applied. Thus, for example, the petitioner's argument cannot be squared with the Internal Revenue Service's regulation of charitable organizations, which has never drawn the distinction urged by the petitioner. The only limitation in the Internal Revenue Code even arguably relevant here is the restriction in section 501(c)(3) which limits the degree to which charities entitled to receive tax-deductible contributions may engage in lobbying. *See Regan v. Taxation with Representation,* 461 U.S. 540 (1983). No similar limitation is imposed on litigation or public education activities. However, petitioner has even disregarded the congressional judgment embodied in section 501(c)(3), which is to *support* lobbying activities up to the specified limit. The

effect of petitioner's exclusionary criteria is to disqualify many section 501(c)(3) charities which engage in lobbying activities expressly permitted by Congress.

Nor is petitioner's argument consistent with the decisions of this Court. In both *State of Maryland v. Munson,* 104 S. Ct. 2839 (1984), and *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980), this Court rejected attempts to subject advocacy organizations to onerous registration requirements not applicable to other charities. Although both of the government entities involved in *Schaumburg* and *Munson* urged the Court to sustain the requirements based, in part, on the distinction urged by the petitioner here, the Court declined to do so.

Moreover, the distinction urged by the petitioner does not hold up when carefully analyzed. In discussing "traditional" charities, the petitioner presumably means those charitable organizations that seek to promote basic health and welfare by providing food to the needy, or conducting research in an effort to find a cure for cancer. Nowhere, however, does the petitioner grapple with the fact, as determined by the courts below, that many advocacy charitable organizations, including respondents, seek similar worthwhile goals. They simply do so by different means, such as conducting litigation over the denial of disability benefits under social security, or by engaging in public education campaigns directed toward increasing federal cancer research. Thus, the distinction relied on by the petitioner for excluding "non-traditional" advocacy groups is without force.

Nor is the distinction as clear as petitioner suggests. The Executive Order nowhere mentions the terms "traditional" or "advocacy" charities, and the distinction is not one

rooted in history. Many "traditional" charities have long engaged in advocacy and public education campaigns, seeking among other things to secure additional funds for federal health and social welfare programs or to inform the public about particular health hazards. Even the petitioner has encountered difficulty drawing lines. Thus, for example, the United States Olympic Committee, which provides no assistance whatsoever to the hungry or the sick, is considered by petitioner to be a "traditional" health and welfare charity, as are legal aid societies, even though they do little but engage in advocacy. These illustrations underscore the vague and indeterminate nature of the distinction petitioner rests his case on, and give rise to *amici*'s fear that petitioner seeks to "pick and choose" among similarly situated charities, and support those with whom he agrees by affording them access to CFC. *Amici* submit that, under any standard, the First Amendment forbids this sort of unbridled administrative discretion. *See, e.g., Perry,* 460 U.S. at 55.

Equally troubling is the fact that the specific justifications offered by the petitioner for excluding advocacy organizations strike at the core of the First Amendment. We examine petitioner's justifications in turn.

1. The principal argument advanced for excluding advocacy organizations is that they are by definition controversial and thus their participation in the CFC endangers the viability of the program. According to the petitioner, some federal workers may decide not to participate in the CFC if there is some possibility that their contributions might support a group with which they disagree.

Amici rely on respondents to demonstrate that the factual predicate for this argument — that inclusion of ad-

vocacy groups might lead to a reduction in employee participation — is without foundation. More fundamentally, however, this Court has long condemned the notion that "controversiality" could qualify as a valid justification for restricting speech. *Police Department v. Mosley,* 408 U.S. 92, 96 (1972); *Tinker v. Des Moines School District,* 393 U.S. 503, 508 (1969); *Terminiello v. Chicago,* 337 U.S. 1 (1949). Indeed, it is settled constitutional doctrine that the government many not rely on a "heckler's veto" to muzzle a controversial speaker, particularly where, as here, there is little beyond speculation to establish that harm might result if the speech is permitted to go forward. *Id.*

Moreover, the exclusion of "controversial" groups to "protect" the CFC smacks of the sort of paternalism this Court has found impermissible in the past. As the Court noted in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 770 (1976), "[t]here is, of course, an alternative to [a] highly paternalistic approach," which is to "assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than close them." *See also Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977). There is no plausible reason to believe that members of the federal workforce are incapable of determining which of the charities participating in the CFC they wish to support. On the contrary, federal employees have a strong interest in the widest range of options, so that they may exercise their expressive and associational rights without restraint. *Amici* urge the Court to reject petitioner's paternalistic approach.[7]

[7]As is explained fully in respondents' brief, any federal employee can completely avoid the possibility of inadvertently supporting an organization with which he disagrees simply by designating his contribution for a group he supports. The availability of this option disposes of petitioner's claim. *Consolidated Edison Co. of New York v. Public Service Comm'n,* 447 U.S. 530, 542 (1980).

2. The petitioner's second justification — that permitting advocacy organizations to participate in the CFC raises the specter of government endorsement of the various advocates — fares no better. While *amici* again leave the factual refutation of this argument to respondents, *amici* submit that *Widmar v. Vincent* disposes of this argument as a constitutional matter.

In *Widmar,* this Court upheld a challenge by a student religious group to the university's refusal to allow the group to use campus meeting facilities, despite the fact that the university permitted other student groups to meet on campus. The university defended the exclusion on the ground that the Establishment Clause of the Constitution required it to deny the students access because granting permission might appear to be an endorsement of the group's activities. In ruling against the university's claim, the Court soundly rejected the argument that the exclusion of a class of speakers from a forum can be justified solely on the ground of avoiding apparent endorsement, particularly where, as here, there is no basis for anyone to confuse the role of the government with that of the speaker. 454 U.S. at 274 & n.14. Thus, the Court has already rejected precisely the argument on which the government relies. *See also Prune Yard Shopping Center v. Robins,* 447 U.S. 74, 87 (1980) (rejecting endorsement theory).

Of equal importance, the Court also recognized in *Widmar* that what the university was seeking to enforce was, at its core, a content-based restriction, which was imper-

missible, absent a compelling state interest. Here, the exclusion of advocacy organizations is nothing other than a content-based restriction of the kind condemned in *Widmar*. By distinguishing among organizations solely on the basis of the type of associational and expressive activities in which they engage, the government is promoting the speech of what it considers to be more traditional charities, while punishing through the denial of access to the CFC those charities that engage in advocacy. The First Amendment's hostility to content-based regulation of speech is indisputable. As the Court reiterated in *Widmar*, "[o]ur cases have required the most exacting scrutiny in cases in which a State undertakes to regulate speech on the basis of its content," 454 U.S. at 276 (citations omitted), and the petitioner has proffered no compelling justification here.

The petitioner's determination that involvement in litigation and public advocacy justifies disqualification from the CFC only heightens the offensiveness of the exclusion. It is firmly established that the right to engage in litigation is protected by the First Amendment, both as a means of petitioning the government for redress of grievances, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), and as an important component of the right of association. *NAACP v. Button*, 371 U.S. 415, 430 (1963). Accordingly, this Court has consistently relied on the First Amendment in striking down attempts to interfere with the right to seek redress in the courts. *See, e.g., United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222-23 (1967); *cf. In re Primus*, 436 U.S. 412 (1978). Similarly, this Court has repeatedly emphasized that the right to engage in lobbying and public education to promote political or social

goals is deserving of the full range of First Amendment protections. *See, e.g., Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978); *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940). Petitioner's exclusionary criteria are directly aimed at these protected activities.

Nor does petitioner's contention that the exclusion is "viewpoint-neutral" alter the fact that the exclusion is a content-based prohibition requiring close scrutiny. This Court rejected precisely the same contention in *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980), noting that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Accord, Carey v. Brown*, 447 U.S. 455, 462 (1980); *Police Department v. Mosley, supra*. Thus, it is of no significance that the petitioner's exclusion applies with equal force to all advocacy groups, regardless of political orientation.

3. As its final argument, the petitioner suggests that the exclusion is proper because alternative forums exist which afford the excluded charities an opportunity to seek the support of federal workers. Thus, the petitioner contends that the excluded charities could solicit contributions from federal workers outside the workplace or engage in direct mail or door-to-door campaigns directed at federal employees, even though he concedes that these methods of fund-raising would not be as effective as participating in the CFC.[8]

[8]To *amici*'s knowledge, comprehensive listings of federal employees are not available, and therefore it would not be possible to engage in direct mail or door-to-door solicitation. Thus, the proposed alter-

The principal flaw with this argument was correctly identified by the court of appeals: in the absence of some reasonable basis for excluding advocacy groups which is directly tied to the purpose of the CFC, the mere existence of alternative channels of communication, even if they are equivalent in all respects, cannot justify an otherwise unreasonable discrimination among charities. The fact that at times this Court has suggested that the existence of alternative channels may be a factor in determining the reasonableness of an exclusion does not help the petitioner. In each of those cases, there were reasonable justifications proffered for the exclusion which had no relation to the content of the expression. And in each of these cases, the exclusions at issue were content-neutral time, place and manner restrictions, which did not implicate any of the sensitive First Amendment concerns raised by the justifications petitioner has offered.

Instead of supporting petitioner, this line of cases substantially undercuts his position. While this Court has upheld time, place and manner restrictions, it has also made plain that the existence of alternative channels of communication does not in itself justify excluding similarly situated speakers. *E.g., Clark v. Community for Creative Non-Violence,* 104 S. Ct. 3065, 3069 (1984); *United States v. Grace,* 461 U.S. 171 (1984); *Schneider v. State,* 308 U.S. 147 (1939). Rather, the Court has consistently held that such an exclusion must be grounded in a compelling state interest, which is plainly absent here.

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natives are markedly inferior to the CFC, and, under such circumstances, the Court has rejected "alternative channels" arguments. *See, e.g., Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 556.

CONCLUSION

For the reasons stated above, and those given in respondents' brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 84-312

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

—v.—

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICUS CURIAE PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. IN SUPPORT OF RESPONDENTS

Interest of Amicus*

Planned Parenthood Federation of America, Inc. (Planned Parenthood) is a not-for-profit corporation organized in 1922 and existing under the laws of New York State. It is the largest private organization in the United States in the field of family planning. Planned Parenthood has participated in the Combined Federal Campaign (CFC) as a national voluntary organization since 1968 and received $550,373 in designated employee contributions in the Fall 1983 campaign.

* All parties have given their consent to the filing of this brief in letters filed with the Clerk of this Court.

Planned Parenthood is a national-level organization; it has 187 affiliates in 44 states and the District of Columbia, all separately incorporated and locally controlled not-for-profit entities. The affiliates operate 735 local clinics which provide family planning services in the form of medical, educational and counseling services to individuals and families. Planned Parenthood provides leadership and support to its affiliates in the form of medical standards and guidelines, guidance in affiliate management and educational, legal, public affairs, public relations, and educational services. A number of affiliates participate separately in local CFC's, either individually or as members of the United Way in their areas.

Planned Parenthood also provides substantial assistance to overseas family planning programs through its international division, Family Planning International Assistance and its participation in the International Planned Parenthood Federation. Its international programs are the principal beneficiaries of its CFC contributions.

In addition to the provision of medical and educational services to families and individuals nationally and overseas, Planned Parenthood and its affiliates have found it necessary to devote substantial resources to conducting and supporting litigation aimed at preserving and defending the legal rights of their clients to obtain these services.

Planned Parenthood's position in the CFC is, therefore, directly threatened by Executive Order 12,404 which bars from participation in the CFC organizations which seek to influence the determination of public policy through litigation. Because it pursues both traditional health and welfare services and legal advocacy to defend those services, Planned Parenthood believes that it is in a unique position to illustrate to the Court the unreasonableness and artificiality of the Executive Order's distinction between "direct" health and welfare charities and legal advocacy groups.

Planned Parenthood also believes it can contribute significantly to this litigation by bringing before the Court the history

of its protracted struggle with Petitioner over the past four years for continued participation in the CFC. Planned Parenthood believes that this history will illustrate to the Court that the disputed Executive Order is not a reasonable regulation, evenhandedly applied, but an attempt by Petitioner to suppress speakers and ideas with which he disagrees.

In addition to its assistance to the Court in resolution of the issues in this case, Planned Parenthood has an immediate interest in the outcome of this litigation. Although not a party to this case, Planned Parenthood has an identical companion case pending in the District Court for the District of Columbia. The suit was filed soon after the district court's July 15, 1983 order in the present case in favor of Respondents' admission to the CFC.

Within days of the July 15 order, Petitioner stated to a Congressional committee his intention to view the court's order as applicable only to the seven named plaintiffs (Respondents here) and to continue to apply the Executive Order's exclusionary criteria to all other organizations seeking admission to the CFC. Statement of Donald J. Devine, Director of U.S. Office of Personnel Management before the Subcommittee on Manpower and Housing of the Committee on Governmental Operations of the U.S. House of Representatives, Reform of the Combined Federal Campaign, 7 (July 19, 1983) (hereinafter "Congressional Statement").

Believing on the basis of its prior experience with Petitioner (outlined below) that it would be one of the targets of that policy, Planned Parenthood, along with the Native American Rights Fund (NARF), brought suit against Petitioner, seeking a temporary restraining order and a preliminary injunction against its exclusion from the campaign on the basis of the criteria just held unconstitutional. *Planned Parenthood Federation of America, Inc., et al. v. Devine*, No. 83-2118 (D.D.C. July 22, 1983). On July 26, 1983 the parties entered into a stipulation, approved by the district court, in which Planned Parenthood and NARF agreed to withdraw their

motion for a preliminary injunction and Petitioner agreed not to exclude the two organizations from the CFC on the basis of the disputed portions of the Executive Order. The parties further agreed that the final disposition on appeal of the legal defense fund case would apply to Planned Parenthood and NARF. (Stipulation and Order attached hereto as Appendix B.) The resolution of this case will, therefore, have an immediate impact on Planned Parenthood's pending litigation and its status in the CFC.

Summary of Argument

Part one sets out the history of Planned Parenthood's protracted struggle with Petitioner for continued participation in the CFC. Planned Parenthood submits that this history demonstrates that Executive Order 12,404 is an effort to suppress a speaker and a point of view which Petitioner opposes in violation of this Court's decision in *Perry Education Association v. Perry Educators' Association*, 460 U.S. 37 (1983). At the least, the history set out here should lead this Court, as it did the court of appeals, to view with suspicion Petioner's other, purportedly neutral and "reasonable," explanations for the Executive Order.

Part two argues that there is no reasonable basis for the Executive Order's distinction between "traditional health and welfare charities" and groups engaged in legal advocacy. Planned Parenthood, a participant in the CFC since 1968, is a "traditional" charity in the sense that it delivers and supports direct medical and educational services to individuals and families; yet, the organization has found it necessary throughout its history to engage in a substantial amount of litigation to defend the legal right of the people it serves to receive reproductive health care. By eliminating from the CFC charities which engage in legal advocacy, the Executive Order will penalize even the most "traditional" groups for whom litigation is an essential element of the delivery of health and welfare services.

ARGUMENT

I. EXECUTIVE ORDER 12,404 IS AN ATTEMPT TO SUPPRESS IDEAS WITH WHICH THE PETITIONER DISAGREES.

This Court, in *Perry Education Association v. Perry Educators' Association*, 460 U.S. 37 (1983), set out the minimum test for the constitutionality of government attempts to limit access to public property by those wishing to engage in expressive activity.

> . . . the state may reserve the forum for its intended purposes communicative or otherwise as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.

460 U.S. at 46. Because the court of appeals found Executive Order 12,404 an unreasonable regulation of speech, it found it unnecessary to reach the question of whether it was also an attempt to limit expression because of official bias against the speakers' views. *NAACP Legal Defense and Educational Fund v. Devine*, 727 F.2d 1247, 1259 n.12 (D.C. Cir. 1984) Petitioner, nevertheless, asserts that

> [i]t is clear that the limitation of Campaign participation to traditional health and welfare charities is not based on opposition by federal officials to the views of the groups that are thereby excluded.

Brief of Petitioner at 30.

The history of Planned Parenthood's struggles with Petitioner for continued participation in the CFC makes clear, however, that the Executive Order forms an important part of Petitioner's campaign to expel Planned Parenthood from the federal charity drive because of his disagreement with its views on abortion, in violation of the second prong of the test enunciated in *Perry*.

Before his appointment to federal office in 1981, Petitioner was involved in the anti-abortion movement as a director of the LIFE-PAC group. He has made no secret of his feelings toward Planned Parenthood, frequently expressing his abhorrence of its "promotion" or practice of abortion[1] and expressing the opinion that "in a just world" it would not be part of a charitable campaign. (See discussion at pages 7, 11 *infra*). But he has by no means stopped at expression of his personal views; he has used his office to try to carry them into effect to the prejudice of Planned Parenthood.

Prior to Petitioner's tenure at the Office of Personnel Management (OPM) Planned Parenthood's right to participate in the CFC had seemed secure. It had been part of the Campaign since 1968, soliciting funds for its international family planning programs under its registered service mark "Planned Parenthood-World Population". Although anti-abortion groups had protested Planned Parenthood's participation in the CFC at the yearly meetings of the National Eligibility Committee, a group which recommends charities to be included in the campaign, both the Committee and the Director of OPM had always found that Planned Parenthood met all criteria for participation in the campaign and decided for its continued inclusion in the CFC. With Petitioner's appointment to head OPM, things changed.

In the fall of 1981 Petitioner drafted and sent to the White House a proposed executive order that would have excluded Planned Parenthood from the CFC by disqualifying organizations which provide abortions, abortion related services or counseling or referrals to other organizations that provide such

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1 Planned Parenthood does not itself perform abortions either in the U.S. or overseas. It does, however, publicly advocate, lobby and litigate in order to defend a women's constitutional right to abortion recognized in *Roe v. Wade*, 410 U.S. 113 (1973). Abortion services are provided by approximately 40 local Planned Parenthood affiliates and all 187 affiliates provide referrals for abortion and counseling in the options available to a pregnant woman, including abortion, adoption and keeping the child. Neither Planned Parenthood nor its affiliates "promotes" abortion.

services. In addition, the proposed order, like the one at issue in this case, would have barred from the campaign organizations which attempt to change public policy through lobbying and litigation. In a memorandum to the Director of Cabinet Administration accompanying the proposal, Petitioner listed Planned Parenthood-World Population, along with all of the Respondent legal defense funds that were then participants, as among the limited number of organizations expected to be disqualified from the CFC on the basis of the criteria he was recommending. The White House declined to adopt the proposed executive order drafted by Petitioner and, instead, issued Executive Order 12,353 which did not attempt to bar participation by groups on the basis of their views or actions regarding abortions or their participation in advocacy or litigation.

At about the same time, Petitioner altered the membership of the 1982 CFC's National Eligibility Committee by appointing to it persons with known anti-abortion viewpoints. Notably, Petitioner appointed Terrence Scanlon, who had been the chief spokesperson for the public anti-abortion opposition to Planned Parenthood at the prior year's Committee meeting. Petitioner's efforts paid off and on July 23, 1982 the National Eligibility Committee voted to recommend the exclusion of Planned Parenthood from the CFC on the ground that it was "controversial." Upon receipt of the Committee's recommendation, however, Petitioner stated he felt legally compelled to admit Planned Parenthood to the CFC. Petitioner expressed his regret and revulsion at doing so in a press release.

> "As much as I agree with [the Committee's] view that Planned Parenthood, because of its role in promoting the detestable practice of abortion, should not receive funds by this route, I am legally bound to admit any organization which meets the technical membership requirements," Devine declared. "Therefore, I am reluctantly approving Planned Parenthood for membership in the CFC in 1982. I do believe, however, that this matter is

> ripe for legislative solution, so that abortion groups can be excluded from the campaign in the appropriate legal manner."

Press Release of July 23, 1982, cited in *Planned Parenthood Federation of America v. Devine*, No 82-2162, Slip. Op. at A-3-A-4 (D.D.C. 1983), attached hereto as Appendix A (hereinafter *PPFA I*).

Having made that gesture to obeying the law governing his actions, that evening Petitioner ejected Planned Parenthood from the International Service Agencies (ISA) fundraising group, the category under which Planned Parenthood had participated in the CFC for the prior 14 years, and reclassified it to the National Service Agencies (NSA) group. This seemingly technical change—later ruled unconstitutional—resulted in Planned Parenthood's exclusion from many local campaigns[2] and would have cost Planned Parenthood nearly $200,000 in undesignated employee contributions.[3] *PPFA I*, Appendix A.

In *PPFA I* the court, on Planned Parenthood's motion for summary judgment, ruled that Petitioner's action in switching Planned Parenthood's fundraising category was improper be-

2 ISA groups need seek only a single national approval to participate in the CFC across the nation and overseas, while NSAs must submit separate applications to the 550 local CFC committees at federal employee work sites. This was, in fact, what Planned Parenthood was forced to do as a result of Petitioner's last minute action reclassifying it to an NSA. Petitioner's switch left Planned Parenthood only 17 days to accomplish this major administrative task. As a result of the litigation it instituted, Planned Parenthood secured an additional 14 days to apply locally. Even with the extra time, Planned Parenthood was denied permission to participate in approximately 70 local campaigns, resulting in an estimated loss of $125,000.

3 ISA groups, unlike NSAs, receive a share of "undesignated" employee contributions. By litigation challenging the switch, Planned Parenthood succeeded in establishing an escrow arrangement, which eventually secured its share of these funds as an ISA, after the switch was held unconstitutional.

cause it was based on a "secret rule," adopted essentially simultaneously with Planned Parenthood's transfer, and known only to the federal bureaucrats involved, in violation of Planned Parenthood's first amendment right to receive notice and fair warning of official regulations governing expressive activity. The court rejected Petitioner's motion for summary judgment on Planned Parenthood's alternative contention that the transfer was illegal because it was the product of Petitioner's bias. The court cited Petitioner's views expressed in the July 23, 1982 press release, his recommendation for an executive order that would have barred pro-choice organizations from the CFC and his last minute effort to classify Planned Parenthood as an NSA as "ample basis to support the inference that Petitioner's bias motivated his decision." *PPFA I*, Appendix A, Slip op. at A-8.[4]

During the pendency of the litigation in *PPFA I*, the President promulgated Executive Order 12,404, the subject of the present case, which excluded from the CFC groups which pursue their charitable purposes through advocacy and litigation. Order 12,404 is substantially identical, so far as advocacy and litigation are concerned, to Petitioner's earlier draft, rejected by the President, by which Petitioner expected to disqualify Planned Parenthood from the CFC.

Days after the district court's July 15, 1983 order holding Executive Order 12,404 unconstitutional, Petitioner announced at a Congressional hearing that he would apply the court order only to the plaintiffs named in that case. Congressional Statement, *supra* page 3. In order to protect their position in the CFC, therefore, Planned Parenthood, along with the Native American Rights Fund (NARF), filed suit in the District Court for the District of Columbia, seeking to enjoin Petitioner from applying the unconstitutional criteria of the Executive Order to their CFC applications. On July 26, 1983 the district court ordered, with consent of Petitioner, that the plaintiffs not be excluded from the CFC on the basis of the disputed portions of

4 Petitioner voluntarily dismissed his appeal of *PPFA I*.

the Executive Order. *Planned Parenthood Federation of America v. Devine*, No. 83-2118 (D.D.C. 1983). Stipulation and Order annexed hereto as Appendix B. (Hereinafter, *PPFA II*.)

Petitioner promptly proceeded to try to evade the court's order. At its August 31, 1983 meeting the hand-picked National Eligibility Committee again voted to exclude Planned Parenthood. This time anti-abortion groups, in addition to objecting to Planned Parenthood's views on abortion, sex education, and contraception, accused Planned Parenthood of not meeting financial criteria for admission to the campaign. Although no such concerns had been raised by the OPM staff—which had reviewed all applications for "technical" qualifications and had raised questions about many others—Petitioner decided to hold an unprecedented series of "hearings" to pursue the question of whether there was some technical violation that would provide a basis to exclude Planned Parenthood. At the same time he admitted a record 149 charitable organizations to the campaign, including the Moral Majority Foundation and "right-to-life" groups as well as the Respondents in this case.

During three days of hearings, Planned Parenthood representatives documented the organization's compliance with the campaign's financial requirements. Although the hearings ended September 9, 1983, by the following week Petitioner still had not ruled on Planned Parenthood's status. The matter was urgent because the 550 local CFC committees were scheduled to finalize their lists of eligible charities by September 19.

On September 14, 1983, therefore, Planned Parenthood filed a motion in the district court seeking enforcement of the court's order of July 26, 1983 which had barred Petitioner from applying to Planned Parenthood the unconstitutional criteria of the Executive Order. The court found Petitioner in violation of the order and directed him to issue a decision as to Planned Parenthood's CFC eligibility "supported by cogent reasons" by 3:00 p.m. of that day. The court noted:

> It cannot be overlooked that Planned Parenthood has participated in the CFC each year since 1968 and in 1981 and 1982 was granted national eligibility by defendant Devine. Throughout the prolonged investigation of Planned Parenthood, defendant has stated no specific reason for the extra attention now focused on this agency, aside from the suggestions, without noted evidence supporting them, that financial problems exist and that this is a "controversial" agency. At the eligibility hearing on September 2 defendant stated his own views of Planned Parenthood as follows:
>
> > "Everybody knows where I [Director Devine] stand in regard to the kind of practices that Planned Parenthood does. You promote abortions; I think that detestable. I think in a just world, you'd have nothing to do with a charitable drive."
>
> Indeed, the controversial nature of this organization and the vocal opposition of pro-life groups appear to be either the primary factor delaying a decision, or a paramount consideration in that delayed decision.
>
> Defendant's failure to resolve this matter, despite ample opportunity to so so, and the erosion of time in which to appeal a rejection or notify local campaigns of national eligibility in the event that the application is eventually accepted, amounts to a denial of Planned Parenthood's opportunity to participate in the CFC and is a direct limitation of the Court's Order in this regard.

PPFA II, Slip op. at C-3, annexed hereto as Appendix C.

Petitioner issued his decision at 2:50 p.m. on September 14 denying Planned Parenthood's application on the ground that the organization followed the wrong accounting standards, specifically that ..s independent public accountant had used the wrong words in certifying its financial statements. On September 15, after Planned Parenthood had shown that the so-called technical objections were without merit, and that accountants

for admitted groups had used a variety of forms of certification, the Court overruled Petitioner's decision and ordered Petitioner to admit Planned Parenthood to the CFC forthwith. The Court said:

> In light of the differential treatment, the extraordinary and inexplicable delays in the consideration of plaintiff's application, the overall tone of the continuous inquiries, the controversial nature of plaintiff's activities, and defendant's admitted bias against those activities, the Court must conclude that defendant's proffered grounds for denial are merely pretextual, and directly counter this Court's 1983 Orders, both July 15 and 26.

PPFA II, Slip op. at D-2-D-3, annexed hereto as Appendix D. Despite Petitioner's fervent efforts, Planned Parenthood was, therefore, admitted to the CFC for Fall 1983.[5]

The above history demonstrates Petitioner's desire to eliminate from the CFC a speaker and viewpoint that he abhors. Planned Parenthood submits that this history of bias manifested in his administration of the CFC raises a serious question whether the Executive Order violates *Perry*'s second standard—absence of an effort to suppress views opposed by the public officials involved. At the least, it should lead this Court, as it did the court of appeals, to view with suspicion Petitioner's other, purportedly neutral and "reasonable" explanations for the Executive Order. 727 F. 2d at 1262-64.

Petitioner's attempted use of his position to combat an organization he dislikes also dramatizes the dangers inherent in one of the major explanations articulated by Petitioner for excluding Respondent legal defense funds from the CFC—that they are "controversial." The court of appeals noted that Petitioner's treatment of Planned Parenthood starkly illustrated the possibility that the excuse of "controversiality"

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5 The September 15 order technically was a temporary restraining order until a full hearing on the merits. Petitioner the next day agreed to waive the further hearing and to admit Planned Parenthood to the CFC as an ISA.

could be used to suppress speakers to which government officials are hostile. On the basis of Petitioner's treatment of Planned Parenthood, the court, therefore, felt compelled to examine "very carefully" Petitioner's attempt to explain the Executive Order as necessary to exclude so-called "controversial groups," 727 F. 2d at 1262, and to find the explanation constitutionally inadequate.

Likewise, the Court should view with suspicion Petitioner's expressed desire to avoid the appearance of government support for "political advocacy" groups. If anything has "politicized" the campaign it has been Petitioner's harassment of Planned Parenthood for its defense of constitutionally protected rights in the area of abortion. The court of appeals agreed. Noting the inclusion of groups such as the Moral Majority Foundation in the 1983 CFC and the exclusion of Planned Parenthood, the court said,

> One can hardly envision decisions more likely to lead to outcries of 'politicization' and demands for boycotts. The Government cannot simply 'pick and choose' its controversies as a means to restrict speech by those it views disfavorably.

727 F.2d at 1264.

The history recorded here reveals that Petitioner misused his public office to pursue a campaign of harassment against an organization that he personally hated. It is just this type of vindictive animus and abuse of power that the first amendment was designed to guard against.

II THERE IS NO REASONABLE BASIS FOR DISTINGUISHING BETWEEN "TRADITIONAL HEALTH AND WELFARE CHARITIES" AND GROUPS ENGAGED IN LEGAL ADVOCACY.

In this Court, Petitioner lays great stress on the idea that the CFC should be limited to "traditional" charities. The court of appeals concluded that there was no reasonable basis for distinguishing between Respondent legal defense funds, which

Petitioner seeks to exclude from the CFC, and "traditional" health and welfare charities. Key to the court's analysis was its view that, no less than traditional charities, legal defense funds—like other groups potentially excluded under the Order—conform to the Order's requirement that all CFC charities "provide or support direct health and welfare services to individuals and families." 727 F. 2d at 1258. The court found that legal defense funds provide such services by seeking judicial enforcement of the common law, statutory and constitutional rights of their clients, thereby obtaining direct benefits for the needy in such forms as back pay, better housing and education and, in the case of the NAACP Legal Defense and Educational Fund's capital punishment project, life itself. *Id.* at 1260.

Planned Parenthood embodies the provision of direct human services through litigation in a unique way. Planned Parenthood is dedicated to direct delivery of medical and educational services to individuals. With 735 local clinic sites, and a $17 million foreign assistance program, Planned Parenthood and its affiliates together form one of the world's largest private organizations delivering and supporting medical services relating to fertility control. While not its primary mission, litigation has been indispensable to Planned Parenthood in achieving its goal of providing individuals with the means to choose when and whether to bear children. For, from the beginning, Planned Parenthood's services have been fraught with controversy and the organization has been forced to resort to litigation and vigorous advocacy in order to defend its clients' right to receive those services.

One of the earliest instances of the need for litigation to defend the right to obtain birth control information was the arrest in 1917 of Margaret Sanger, Planned Parenthood's founder, for opening the first American birth control clinic in Brooklyn, New York. The appeal of her conviction established the principle that physicians may distribute contraceptives to married women for health reasons. *People v. Sanger*, 222 N.Y. 192, 118 N.E. 637 (1918).

Since then, Planned Parenthood and its affiliates have appeared as parties and *amici* in numerous cases before this Court and the lower federal and state courts supporting the right of individuals to family planning and abortion services.[6] For example, Estelle Griswold, executive director of the Planned Parenthood League of Connecticut, was the defendant in the criminal case in which this Court announced married persons' right to use birth control. *Griswold v. Connecticut*, 381 U.S. 479 (1965). Planned Parenthood filed *amicus* briefs in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973), the cases which declared abortion constitutionally protected. Other Supreme Court reproductive rights cases in which Planned Parenthood participated as *amicus* include *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), *Carey v. Population Services International*, 431 U.S. 678 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *H____ L____ v. Matheson*, 450 U.S. 398 (1981); *City of Akron v. Akron Center for Reproductive Health*, 103 S.Ct. 2481 (1983); *Planned Parenthood of Kansas City, Mo. v. Ashcroft*, 103 S.Ct. 2517 (1983); *Bolger v. Youngs Drug Products*, 103 S.Ct. 2875 (1983). Cases in which Planned Parenthood affiliates appeared as a party include the *Danforth* and *Ashcroft* cases, *supra* as well as *Harris v. McRae*, 448 U.S. 297 (1980) and *Colautti v. Franklin*, 439 U.S. 379 (1979).

Planned Parenthood was itself a plaintiff in the litigation which overturned the so-called "squeal rule," a federal regulation which would have required family planning providers to

6 It is unclear what status Planned Parenthood's litigation activities would have under the Executive Order's exclusion of charities which litigate "on behalf of parties other than themselves," since it normally sues on its own behalf, though sometimes in conjunction with others. However, Petitioner's implementing regulation would have excluded charities which bring litigation in their own names but do so in order to further their "policy goals" rather than their own "direct and private interest." 5 C.F.R. 950.101 (a)(1)(v)(C), 48 Fed. Register 29458, 29460 (June 24, 1983). It appears, therefore, that Petitioner intended to use much of Planned Parenthood's activity as a party or *amicus* in reproductive rights cases to disqualify it from CFC participation.

notify the parents of teenagers when distributing contraceptives to them. *Planned Parenthood Federation of America v. Heckler*, 712 F. 2d 650 (D.C. Cir. 1983). This litigation was of direct benefit to thousands of teenagers who might have shunned family planning clinics and become pregnant had the rule gone into effect. 712 F. 2d at 660-61. Planned Parenthood has also supported litigation establishing the right of nurse practitioners to provide basic reproductive health care. See *Sermchieff v. Gonzales*, 660 S.W. 2d 683 (Mo. Sup. Ct. 1983) (*amicus* brief of Planned Parenthood and other organizations). This litigation directly benefited needy individuals who rely on the affordable services which nurse practitioners provide; it also furthered the federal government's policies on use and training of nurse practitioners in order to hold down the cost of medical care. In addition, Planned Parenthood has, since the mid-1970's, maintained a program of grants and technical assistance to its affiliates and others engaged in litigation, and since 1981, maintained in-house counsel specializing in litigation.

Planned Parenthood's situation illustrates the dangers of an effort by government to define a class of "traditional," non-controversial, "consensus" charities that it will deem sufficiently worthy of federal employees' support to admit to the CFC. Planned Parenthood is nearly 70 years old and it has been part of the CFC since 1968—surely "traditional" by longevity standards. Yet, throughout Planned Parenthood's history, litigation has played an essential and integral role in carrying out its primary mission of assisting individuals to control their fertility. In fact, without that litigation Planned Parenthood's family planning and abortion services simply could not have been provided legally, *see e.g., Sanger, Griswold* and *Roe, supra*, and existing services, notably its services to minors, would have been severely curtailed, *see e.g., Danforth, Bellotti, Akron,* and *PPFA v. Heckler, supra*. By eliminating from the CFC any charity which litigates to secure the rights of the people it serves, the Executive Order will severely penalize conduct which is not only constitutionally protected, *NAACP v. Button*, 371 U.S. 415 (1963), but essential to the very existence of even the most "traditional" charities that must weather times when public opinion labels their services "controversial."

The long history of Planned Parenthood's pursuit of its charitable ends through provision of both direct medical and educational services and litigation also illustrates the absurdity of Petitioner's contention that the Executive Order will return the CFC to its "original scope." Planned Parenthood's litigation activity predates by half a century its entry into the CFC in 1968 and those activities have continued unabated since then. Yet, until the advent of the disputed Executive Order, Planned Parenthood's litigation activities were never viewed as incompatible with its primary charitable purposes. By disqualifying any organization which engages in litigation to affect public policy, the Executive Order threatens with exclusion from the CFC Planned Parenthood and other organizations which have participated in the CFC for many years as part of its core of so-called "traditional" health and welfare charities, but who have been forced to litigate (or otherwise deal with public policy issues) in pursuit of their charitable goals.[7]

7 The Executive Order is quite clear that an organization that spends *any* funds on advocacy activities, including litigation and lobbying, is subject to being disqualified from CFC participation. The proposed regulations, now superseded, that would have implemented the order disqualified only those organizations which spend 15% or more of their budgets on "advocacy" activities. 5 C.F.R. 950.101 (a)(2), 48 Federal Register § 29458, 29460 (June 24, 1983). This percentage dispensation—apart from being inconsistent with this Court's holdings in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) and *Secretary of State of Md. v. Munson*, 81 L. Ed. 2d 786 (1984)—does little to ease the concern of Planned Parenthood or other organizations with active public affairs programs, especially given the absence of standards for defining what policy-related activities count against the limit.

Planned Parenthood also submits that there is a serious question whether an Executive Order, much less an OPM regulation, can validly impose more stringent limits than Congress has set on the right of charities to engage in protected expression on public policy issues. For example, the 15% limit would have included litigation, lobbying and action on administrative regulations, while the tax laws allow organizations exempt under 26 U.S.C. 501(c)(3) to spend a higher percentage on lobbying alone without limitation on expenditures for litigation and action on administrative rulemaking. 26 U.S.C. § 4911.

Planned Parenthood's pursuit of its charitable goals through direct medical and educational services and litigation uniquely illustrate the artificiality of Petitioner's attempt to distinguish between "advocacy group" and "traditional" charities. Even "traditional" charities, when their services become controversial, may be forced to resort to the courts to vindicate their clients' rights. Any discrimination based on the pursuit by an organization of litigation in the public interest is wholly unreasonable and, therefore, unconstitutional.

CONCLUSION

For all the foregoing reasons, Executive Order 12,404 should be held unconstitutional.

Respectfully submitted,

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January 18, 1985

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-2162

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.,

Plaintiff,

—v.—

DONALD J. DEVINE,

Defendant.

MEMORANDUM OPINION

This dispute centers on the classification of a charitable organization as a particular type of participant in the Combined Federal Campaign (CFC), the annual charitable fund-raising drive conducted by the United States Government among its employees. Plaintiff Planned Parenthood Federation of America, Inc., an organization devoted to the encouragement of family planning, has brought this action against defendant Donald J. Devine, Director of the Office of Personnel Management (OPM) under whose auspices the CFC is administered. Plaintiff maintains that the manner in which defendant altered its status from an International Service Agency (ISA) to a National Service Agency (NSA) on July 23, 1982, violated plaintiff's rights under the first and fifth amendments as well as the Administrative Procedure Act (APA). Consequently, plaintiff requests declaratory relief that its rights were abridged and injunctive relief barring defendant from treating plaintiff as an NSA with respect to the 1982 CFC. This matter is before the Court on cross-motions for summary judgment. There are no material facts in dispute,[1] *see* Fed. R.

1 The events that transpired when plaintiff was classified as an NSA are not subject to material dispute. The legal significance of these events and the characterizations that the parties wish to attach to the events, however, are subject to serious disagreement.

Civ. P. 56, and since the manner in which plaintiff was classified as an NSA contravened its rights under the Constitution and the APA, the motion for summary judgment by plaintiff will be granted.

I. Factual Background

Before describing the precise manner in which the classification of plaintiff as an NSA was accomplished, it is necessary to discuss briefly how the CFC generally is administered.[2] There are five voluntary groups in which charitable organizations desiring to participate in the CFC are classified: United Way Agencies (local united funds or community chests recognized by the United Way of America), National Health Agencies, the American Red Cross, International Service Agencies, and National Service Agencies. To participate in the CFC, NSAs and ISAs must satisfy varying requirements. For example, NSAs must be approved by the nationwide campaign and by each local CFC in which they desire to participate in order to ensure that the NSAs provide "direct and substantial services" to the public in each local CFC. *See National Black United Fund (NBUF II) v. Devine*, Civil Action No. 81-2531 (D.D.C. Nov. 17, 1981) (upholding requirement of "direct and substantial services" against challenges under APA and first amendment for vagueness). In contrast, ISAs must obtain approval only from the nationwide campaign since a requirement of a local presence would be inconsistent with the fact that ISAs generally perform their services overseas. When federal employees contribute to the CFC, they have the option of designating that a particular charitable organization(s) should receive their contributions or of allowing their undesignated funds to be distributed in a manner determined by the local CFC.

With this thumbnail sketch of the essential elements of the administration of the CFC, attention now can be directed to

2 For a more detailed explanation of the operation of the CFC, *see National Black United Fund, Inc. (NBUF I) v. Devine*, 667 F.2d 173, 174-76 (D.C. Cir. 1981); *NAACP Legal Defense and Educational Fund, Inc. (NAACP LDF II) v. Devine*, 560 F. Supp. 667, 670-71 (D.D.C. 1983).

the events surrounding the classification of plaintiff as an NSA. For thirteen years, including the 1981 CFC administered by the defendant in the present action, plaintiff was classified as an ISA. On July 6, 1982, OPM published final regulations which, *inter alia*, established standards for eligibility for the participation of charitable organizations in the CFC. *See* 47 Fed. Reg. 29496-29512. Apart from continuing the "local presence" requirement for NSAs,[3] these regulations made no attempt to define differences between NSAs and ISAs. On July 23, 1982, the National Eligibility Committee (an advisory group convened to consider what charities should be admitted to the CFC) recommended that plaintiff should be excluded from the 1982 CFC.[4] Notwithstanding this recommendation, OPM issued a press release on the same date which stated:

> "As much as I agree with their view that Planned Parenthood, because of its role in promoting the detestable practice of abortion, should not receive funds by this route, I am legally bound to admit any organization which meets the technical membership requirements," Devine declared. "Therefore, I am reluctantly approving

3 Defendant suggests that the regulations of July 6, 1982, "provide a common-sense standard—provision of services overseas—for treating an organization as international for purpose of the local presence requirement." Defendant's Statement of Material Facts (SMF) 36. The regulatory provisions that defendant cites for this proposition, *see* 5 C.F.R. §§ 950.309(a)(2), 950.405(a)(6) & 950.407, provide no such standard. That the July 6th regulations give no guidance for distinguishing between ISAs and NSAs is confirmed by defendant's concession that an unpublished, draft memorandum was the basis for the decision to classify plaintiff as an NSA instead of an ISA. *See* Defendant's SMF 37. Assuming *arguendo* that any standard to distinguish ISAs from NSAs can be derived from the July 6th regulations, the critical point is that such an implied standard was not relied upon in the classification decision of July 23, 1982. *See* Defendant's Letters Denying Plaintiff's First and Second Requests for Reconsideration (August 2 and 5, 1982).

4 Of the 117 charitable organizations that had participated in prior CFCs, plaintiff was the only one that the National Eligibility Committee recommended should not be admitted to the 1982 CFC.

> Planned Parenthood for membership in the CFC in 1982. I do believe, however, that this matter is ripe for legislative solution, so that abortion groups can be excluded from the campaign in the appropriate legal manner."

That evening, however, defendant determined that plaintiff should be admitted to the CFC as an NSA rather than an ISA for the domestic campaign. Accordingly, a letter was sent to plaintiff that day advising that it had been classified as an NSA.

There is no dispute that the basis for the classification of plaintiff as an NSA on July 23, 1982, was a draft memorandum containing handwritten insertions and changes. At the time that defendant reclassified plaintiff, there had been no public notice of the draft memorandum. In fact, it appears that only defendant, an assistant, and OPM's Office of General Counsel (that assisted in drafting the memorandum) knew that it existed on July 23, 1982. Despite numerous consultations with OPM staff after being notified of the classification decision, plaintiff was provided no explanation for its classification as an NSA. On July 29, 1982, plaintiff sent a letter to defendant requesting reconsideration of its classification as an ISA. Defendant responded by letter on August 2nd denying the request for reconsideration.[5] Plaintiff

5 For the first time, defendant attempted to provide some explanation for his action. The August 2nd denial of the request for reconsideration provides in pertinent part:

> The distinction between ISA and NSA is the distinction between charitable services rendered overseas and those that are provided domestically to Americans. PPF of A's national application materials plainly indicate that its activities are significantly domestic in scope. PPF of A reported a total of $158,025,333 in support and revenue in 1980. Only $16,861,383, representing just 10.6% of that revenue, was expended for international services.

While defendant's reasoning was revealed to some extent, plaintiff was unaware of the draft memorandum upon which its classification as an NSA rested. Hence, although it may be charitably claimed that plaintiff was given some hint of the basis for its classification, *see* Defendant's SMF 39, there can be no basis for the assertion that the August 2nd letter informed plaintiff of defendant's assignment standards since those standards which were contained in the draft memorandum still had not been disclosed. *See id.*

filed the instant action on the next day with an application for a temporary restraining order. On August 4, 1982, defendant finally revealed his basis for classifying plaintiff as an NSA when he disclosed the decisional standards in the Federal Personnel Manual (FPM). Those standards provided that "[a] voluntary agency whose services are rendered exclusively or in substantial preponderance overseas will be assigned to ISA" and "all other voluntary agencies, including those of a mixed character, will be assigned to NSA." FPM Letter No. 950-1, § 2(d)(1) & (3) (August 4, 1982). At the same time that the decisional standards were disclosed, defendant invited plaintiff to submit a second request for reconsideration, an invitation which plaintiff accepted by gathering all the materials that it believed relevant and submitting them to defendant that day. On the next day, defendant denied the second request for reconsideration and for the first time provided a full explanation for the July 23rd action that classified plaintiff as an NSA.

The classification of plaintiff as an NSA allegedly has injured plaintiff in several respects. The most serious financial effect is that being classified as an NSA excluded plaintiff from some local CFCs,[6] depriving it of both designated and undesignated contributions. In addition, plaintiff anticipates receiving far less undesignated funds from the 1982 CFC because NSAs traditionally are awarded a much smaller percentage of

6 Despite the fact that the regulations of July 6, 1982, refer to undesignated funds as "deemed designated funds," the Court will employ the terminology in use prior to the promulgation of the regulations for convenience. Defendant has submitted an affidavit suggesting that in the largest local CFC, plaintiff would receive approximately half the undesignated funds received from 1981 CFC if it would have been classified as an ISA for the 1982 CFC. *See* Affidavit of William A. Schaeffler, Director of the National Capital Area CFC. Although this affidavit is probative on the amount of undesignated funds lost by plaintiff due to classification as an NSA, there appears to be no dispute that plaintiff would receive a substantial amount of additional undesignated funds—approximately $100,000—if it would be viewed as an ISA for the 1982 CFC.

undesignated contributions than are ISAs.[7] A final effect that classification as an NSA may have had on contributions is that some potential contributors may have contributed less to plaintiff because they attached some significance to its prior status as an ISA or became confused by the reclassification for 1982 as an NSA. The last injury allegedly suffered is the loss of the established relationship with other ISAs and the coordinating body for the ISAs, International Service Agencies—Federal.[8]

II. Legal Analysis

To challenge the manner in which defendant classified plaintiff as an NSA, plaintiff has advanced four legal arguments. First, plaintiff contends that the classification violated its first

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7 The litigants have submitted a series of affidavits concerning how many local CFCs excluded plaintiff and the reasons for those exclusions. Accepting defendant's representations which should portray defendant at least as favorably as plaintiff's representations, 113 local CFCs denied plaintiff's participation but plaintiff successfully appealed those determinations in 86 instances. *See* Affidavit of Kent Bailey, Program Analyst at OPM. Of the 27 campaigns where OPM upheld plaintiff's exclusion, 14 were appeals submitted to OPM in an untimely manner, 9 were instances where a local presence had not been demonstrated, 2 were cases where the initial applications to the local CFC were untimely, and 2 were local CFCs where plaintiff's affiliate already was participating. *See id.* Aside from the two campaigns where a representative of plaintiff was included, defendant thus concedes that plaintiff was excluded entirely from 24 local CFCs. In addition, however, defendant has not disputed that in 29 of the "successful" appeals, the local CFCs still excluded plaintiff because OPM's action was too late. *See* Affidavit of Captain Robert S. Brookings, Director of Plaintiff's CFC Activities ¶ 7. Moreover, plaintiff was informed of its exclusion in 17 other CFCs long after the time to appeal to OPM had passed. *See id.* ¶ 8. Hence, plaintiff was not permitted to participate in approximately 70 local CFCs in which plaintiff estimates over $125,000 in designated contributions would have been received. *See id.* ¶ 9.

8 The ensuing analysis will rest on the undisputed injuries of the loss of undesignated funds and the exclusion from some local CFCs which bars the receipt of designated funds. To substantiate the last two alleged injuries, plaintiff would have to make satisfactory showings at an evidentiary hearing.

amendment rights because final agency action rested on a secret rule defining ISAs. Second, plaintiff maintains that the classification violated its first amendment rights because it would not have occurred if defendant had not determined to penalize plaintiff for its stance in favor of abortion. Third, plaintiff claims that the definition of ISAs that it allegedly did not satisfy was unconstitutionally vague under the first amendment. Fourth, plaintiff suggests that defendant failed to comply with the APA in releasing the rule defining ISAs on August 4, 1982, because the rule was not published in the Federal Register. Defendant has filed a motion for summary judgment on all four claims while plaintiff has filed a similar motion on all claims except defendant's alleged bias against plaintiff as a motivating factor for classification as an NSA. For the following reasons, the Court will grant plaintiff's motion for summary judgment on the ground that employing a secret rule to classify plaintiff as an NSA violated plaintiff's rights under the first amendment and the APA.

Although only plaintiff's first claim with the additional basis of the APA provides justification for granting summary judgment to plaintiff, the other three claims merit some attention. Initially, there can be no doubt but that defendant's motion for summary judgment on the issue of defendant's animus toward plaintiff as the cause of the classification is ill-founded. The Supreme Court has established clear standards by which to evaluate this claim. *See Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Plaintiff must demonstrate by a preponderance of the evidence that defendant's decision was made by reason of the exercise of its first amendment rights to encourage family planning through various means including abortion. *See id.* at 283-84 Defendant then would have to demonstrate by a preponderance of the evidence that he "would have reached the same decision" even if plaintiff had not engaged in its protected first amendment conduct. *Id.* at 287. Defendant's July 23, 1982, press release expressing that he found plaintiffs exercise of its first amendment rights to promote abortions detestable is alone sufficient to create a material issue of fact. Combining defendant's

statement with his recommendation for an executive order that would bar any pro-abortion charities from the CFC and the last-minute effort to classify plaintiff as an NSA (and failing to subject other ISAs to the new ISA definition until a somewhat later time) provide an ample basis to support the inference that defendant's bias motivated his decision. Moreover, these same undisputed facts block defendant's claim on summary judgment that plaintiff would have been classified as an NSA regardless of its pro-abortion position.[9] Of course, defendant is correct that all of these facts also may be explained by innocuous reasons. Yet, it is hornbook law that where undisputed facts fairly support conflicting inferences—particularly where bias or animus is at issue—a trial is essential.[10] Accordingly, defendant's motion for summary judgment on the issue of bias employed to punish the exercise of first amendment rights must be denied.

While the grant of summary judgment will not rest on plaintiff's claims of vagueness and inadequate notice, defendant should be apprised if he chooses to present an ISA definition through appropriate means that there is a substantial likelihood that the present rule would have to be defined more extensively to withstand a vagueness challenge and would have to be published at the appropriate time in the Federal Register. Two recent cases in this judicial district have considered vagueness challenges to definitions provided by OPM for the CFC. *See NBUF II v. Devine, supra; NAACP Legal Defense Fund*

9 For example, defendant's recommendation of an executive order barring any pro-abortion group from the CFC creates a material issue of fact whether the NSA classification would have resulted absent plaintiff's exercise of its first amendment rights.

10 Defendant contends that he had no personal knowledge of the distribution arrangement for undesignated funds from the 1982 CFC. Yet, plaintiff still is entitled to prove that defendant contemplated that the undesignated funds would be distributed in a manner similar to past CFCs when ISAs received significantly greater undesignated funds than NSAs. Defendant has not denied that he was aware that classifying plaintiff as an NSA forced plaintiff to demonstrate a local presence in each of the local CFCs in which it wished to particpate.

(NAACP LDF I) v. Campbell, 504 F. Supp. 1365 (D.D.C. 1981). In *NBUF II*, the definition of "substantial services" was upheld because NBUF was among the organizations proposing a virtually identical standard. Further the definition provided both a series of examples of what would constitute "substantial services" and outlined certain activities which would not be required to satisfy the definition. *See* Slip op. at 3, 4 & 9. In contrast, the court in *NAACP LDF I* struck down as vague OPM's definiton of "direct services" because only OPM could explain its definition by stating that certain other charitable organizations satisfied the definition. *See* 504 F. Supp. at 1367. The instant case appears much closer to *NAACP LDF I* than to *NBUF II*. The ISA definition provides no examples of "overseas" activities or activities unnecessary to satisfy this definition and plaintiff had not even a vague hint that the definition was forthcoming. Hence, all that the definition provides is a synonym for the term "international,"—overseas. Moreover, although the term modifying "overseas"—"substantial preponderance" and "mixed character"—"may appear at first glance to have a plain, unambiguous meaning sufficient to guide governmental decisionmaking," *id.*, there is a significant danger that these terms absent some guidelines are too imprecise to withstand a vagueness challenge.[11]

The manner in which defendant classified plaintiff as an NSA also is susceptible to serious challenge under the APA for failure to publish the ISA definition in the Federal Register. Defendant's response is that the ISA definition is an interpretive rule that does not necessitate such formal notice. Defendant contends that the ISA definition merely provided interstitial refinement for an ISA definition present in the regulations of July 6, 1982. There is a strong argument,

11 Defendant's application of the ISA definition also may provide the basis for an equal protection claim. Given plaintiff's assertion that other ISAs were not examined under this definition until several days after plaintiff was classified as an NSA and that other ISAs were not classified as NSAs despite having weaker bases to remain ISAs than plaintiff, it appears that plaintiff can claim that the application of the ISA definition deprived it of equal protection.

however, that there is no definition of "international services" in the July 6th regulation so that the justification for construing the ISA definition as an interpretive rule is questionable. Assuming *arguendo* that the ISA definition is an interpretive rule, it does not appear that defendant has provided any rebuttal to plaintiff's contention that it was OPM practice not to use the Federal Personnel Manual (FPM) for any CFC rules beyond housekeeping matters such as the mechanics for payroll deductions. *See* Deposition of Joseph Patti, at 70. Therefore, past OPM practice may support the conclusion that notice of the ISA definition in the FPM was inadequate under the APA.

Despite the Court's serious reservations with the precision of the ISA definition and the adequacy of notice under the APA, the basis for granting summary judgment to plaintiff is that classifying plaintiff as an NSA with a secret rule violates fundamental requirements of the first amendment and the APA. Before discussing the specific rule at issue, it is necessary to explain the role of the first amendment in evaluating the manner in which plaintiff was classified as an NSA. Initially, it is well established that charitable solicitation is protected activity under the first amendment. *See Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). As Judge Gesell has cogently explained, regulations affecting access to the CFC are subject to first amendment scrutiny:

> Although the mechanisms of the CFC drive do not allow for the sort of persuasive, informative activity that is often present in solicitations on street corners or door-to-door, the participating organizations are afforded favorable publicity concerning their objectives and the money received may be used in some instances for activity that falls squarely within the First Amendment. Furthermore, by providing organizations the opportunity to participate in the CFC, the government has, in effect, provided a billboard or channel of communication through which organizations can disseminate their appeals to federal workers . . . . It is clear that the government must meet

> First Amendment strictures in its regulations concerning access to this channel of communication, which is, in fact, the only channel by which organizations can appeal to government employees at their work place.

NAACP LDF I v. Campbell, 504 F. Supp. at 1366-67 (citations omitted). *See NBUF I v. Devine*, 667 F.2d at 178-79 & n.25 (endorsing Judge Gesell's view of the application of first amendment strictures to CFC regulations). Hence, defendant's classification of plaintiff as an NSA must be examined under the first amendment.[12]

Having concluded that the manner in which defendant classified plaintiff as an NSA must meet the requirements of the first amendment, it remains necessary to determine what particular requirements were not satisfied. When defendant classified plaintiff as an NSA on July 23, 1982, the draft memorandum that concededly formed the basis for defendant's decision was a secret rule that could have no legal effect. In essence, the rule defining ISAs consituted the most extreme form of vagueness, a secret rule known only to the individuals that enforce it. The United States Court of Appeals for the District of Columbia Circuit has outlined the dual policies that underlie the vagueness doctrine. "First, the vagueness doctrine incorporates the idea of notice—informing those subject to the law of its meaning . . . . Second, the doctrine is concerned with providing officials with explicit guidelines in order to avoid arbitrary and discriminatory enforcement." *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030 (D.C. Cir. 1980).

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12 Defendant has argued at length that because the classification as an NSA did not exclude plaintiff entirely from CFC, first amendment protection is unwarranted. The Court rejects this expansive argument which suggests that severe obstacles could be imposed to limit the ability to conduct charitable solicitation without activating first amendment interests. Moreover, plaintiff has been totally excluded from participation in approximately 70 local CFCs as a direct result of its classification as an NSA. Plaintiff would have been included automatically in these local CFCs and would have received both designated and undesignated funds if it would have been classified as an ISA. In addition, it is important to note that it is conceded that exclusion from at least nine CFCs occurred due to the failure to show a local presence which only NSAs must demonstrate.

Applying the policies underlying the vagueness doctrine to the instant rule defining the ISAs demonstrates that the rule neither provided adequate notice nor imposed any check on arbitrary and discriminatory enforcement. At the time of final agency action when OPM notified plaintiff of its classification as an NSA on July 23, 1982, plaintiff had no notice of any rule relating to the definition of ISAs. In fact, plaintiff did not become aware of the rule until after defendant denied plaintiff's first request for reconsideration. Therefore, the rule defining ISAs was unconstitutionally vague because plaintiff had no notice of the rule before defendant applied the rule to plaintiff. Applying a secret rule also imposes no restraint on the administrator's ability to engage in arbitrary and discriminatory enforcement. As long as the rule is undisclosed, the administrator has boundless discretion to selectively enforce the "rule" or to change the substance of the "rule" from one day to the next if he so desires.[13] This situation is analogous to that of a licensing authority that regulates speech-related activities through the use of secret guidelines. *See, e.g., Police Department of Chicago v. Mosley*, 408 U.S. 92, 97 (1972) ("licensing schemes that lodge broad discretion in a public official [impermissible] because of their potential use as instruments for selectively suppressing some points of view"); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Cox v. Louisiana*, 379 U.S. 536, 555-58 (1968). Thus, "[w]hen the government restricts First Amendment activities, the restriction must *at the outset* be set forth with precision" *NAACP LDF I v. Campbell*, 504 F. Supp. at 1368 (emphasis added). In the present case, the rule defining ISAs was not set forth with precision, much less set forth, prior to defendant's decision to classify plaintiff as an NSA.

Defendant attempts to avoid the conclusion that the secrecy of the rule defining ISAs necessitates finding the rule void for

13 Accepting for the moment that defendant's assertion that the ISA definition of July 23 reflected only his "rough judgment" was not itself a post-hoc rationalization, the assertion confirms that defendant reasonably contemplated changing the secret rule after that rule had been applied to at least one charitable organization in the CFC.

vagueness by advancing three arguments: 1) the standard applied in classifying plaintiff as an NSA was the same standard that had been in effect throughout the history of the CFC; 2) the July 23, 1982, decision classifying plaintiff as an NSA was only an "initial, preliminary" decision; 3) plaintiff was afforded all the process that any court would require when it was able to make a second request for reconsideration. None of these arguments are persuasive.

Defendant's first argument that the same standard that was employed in past CFCs was relied upon to classify plaintiff as an NSA is simply not credible. Plaintiff has been classified as an ISA for thirteen successive CFCs from 1968 through 1981. It is quite significant that plaintiff was classified as an ISA for the 1981 CFC that was administered by defendant himself who concededly applied the eligibility standards to the best of his abilities during that CFC.[14] Moreover, at other points in his pleadings, defendant has maintained that the basis for the NSA classification of plaintiff was the ISA definition derived from the July 6, 1982, regulations and contained in the draft memorandum of July 23, 1982. All of these facts combine to demonstrate that there can be no doubt that the standard employed by defendant to classify plaintiff as an NSA had no precedent in prior CFCs.

The second argument advanced by defendant is that standards truly were in place when he decided how to classify plaintiff on August 5, 1982, and that his decision on July 23, 1982, was only an "initial, preliminary" decision. As has been explained previously, this argument at most highlights the chameleon-like potential of a secret rule that provides no check on arbitrary and discriminatory enforcement.[15] As an effort to

14 Defendant has proferred no reasons why plaintiff's 1981 CFC application varied from the 1982 CFC application in a manner that would have justified classifying plaintiff as an ISA in 1981 and an NSA in 1982.

15 Defendant has pursued contradictory positions. Defendant has attempted to minimize the danger of arbitrary and capricious enforcement of a secret rule by claiming that the rule finally disclosed on August 4, 1982, was identical to the rule defining ISAs in the draft memorandum. Of course, that alleged likeness does nothing to mitigate the fact that a secret standard is

shift the date of the defendant's decision to postpone the point at which standards had to be in place, it fails as a faulty characterization of the entire administrative process surrounding the classification of plaintiff as an NSA. The July 23rd decision plainly constituted final agency action. Defendant never informed plaintiff that the July 23rd decision classifying plaintiff as an NSA was in any sense tentative or preliminary.[16] Regardless of what possible action defendant allegedly would have taken after the July 23rd decision,[17] the fact remains that the classification of July 23, 1982, fixed plaintiff's status as an NSA. If plaintiff had taken no further action, it would have been treated as an NSA for the 1982 CFC. Hence, the July 23rd decision constituted final agency action notwithstanding defendant's inherent ability to reconsider the decision. Perhaps it is arguable that a "final" decision is not reached until after a motion for reconsideration has been considered. Yet, plaintiff's motion for reconsideration was denied without disclosure of the secret rule (or at best was implicit in the denial of the motion for reconsideration) and plaintiff instituted this action the next day, one day before revelation of the rule in the FPM. A determination of final agency action cannot hinge on the number of invitations for reconsideration that are made. Thus, to avoid a determination of void for vagueness, the standard must have been set forth with precision prior to the July 23rd decision classifying plaintiff as an NSA.

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effectively no standard since it can be manipulated at will. In addition, defendant's position that the July 23rd decision was preliminary in nature undercuts the asserted unchanging nature of the rule between July 23 and August 4, 1982.

16 Defendant was well aware of how to indicate that his decision based on the draft memorandum was only a proposed action or that the rule defining ISAs was only a proposed rule. Yet, defendant never gave any indication that his July 23rd decision was anything other than final.

17 Defendant's assertion that the July 23rd decision reflected only his rough judgment is entitled to less weight because the allegedly flexible nature of the decision is itself a post-hoc rationalization.

The third argument defendent presents to counter a conclusion of void for vagueness is that even if he erred by acting upon a secret rule, he took steps—disclosing the standard on August 4, 1982, and inviting plaintiff to submit a second request for reconsideration which was denied the next day—that adequately remedied any error. In fact, defendant believes that the action he took was as much as any court would have ordered to remedy his earlier reliance on a secret rule. While defendant's allegedly remedial actions address the first policy underlying the vagueness doctrine by giving plaintiff notice immediately prior to the second request for reconsideration, these actions had absolutely no impact on the second policy that use of a secret rule permits arbitrary and discriminatory enforcement.[18] Because defendant's decision to reclassify plaintiff as an NSA was based on a secret rule, any later explanation was necessarily a post-hoc rationalization that could not be accepted. For example, a licensing authority could always claim that it never exercised discretion in an arbitrary and capricious manner. Similarly, defendant's claim that the secret rule in the draft document was not altered prior to its disclosure does not diminish the need to apply the vagueness doctrine to prevent the *opportunity* for arbitrary

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18 Throughout these proceedings, defendant has ignored the concern of the vagueness doctrine with arbitrary and discriminatory enforcement of a secret rule. Instead, defendant has argued that first amendment interests are limited or nonexistent because the CFC is not a public forum, the regulation is content-neutral, and the inhibition on plaintiff's communication is minimal. It already has been discussed why first amendment principles are fully applicable to CFC regulations so that the issue of a public forum is irrelevant. In addition, it is difficult to construe plaintiff's exclusion from approximately 70 local CFCs with an estimated loss of over $100,000 in designated funds as a minor inhibition on plaintiff's communication. Yet, a broader principle should be addressed. Aside from the discussion in *NBUF I* regarding whether first amendment principles should be applied to the CFC, *see* 667 F.2d at 178-79, the first amendment analysis outlined in *NBUF I*, which defendant apparently has followed, does not appear relevant to the *separate* requirement of the vagueness doctrine. Assuming *arguendo* that the *NBUF I* analysis is applicable to the instant case, defendant has made no attempt to identify a compelling interest for the ISA definition.

and discriminatory enforcement. The vagueness doctrine applies even where no predisposition by the public official of hostility against a particular group can be identified. Where plaintiff freely concedes his hostility toward plaintiff, it becomes even more essential to have a known standard established to check the ability to engage in arbitrary and discriminatory enforcement. Finally, defendant's actions to remedy the effect of a secret rule were insufficient because the only way to correct a secret rule is to start over again with a rule with which plaintiff is aware. In sum, none of the three arguments advanced by defendant avoid the conclusion that the secret rule defining ISAs must be struck down under the first amendment as void for vagueness.

The foregoing discussion explains why defendant's use of a secret rule abridged plaintiff's rights under the first amendment. An independent basis for invalidating defendant's classification of plaintiff as an NSA is that reliance on a secret rule constitutes arbitrary and capricious conduct under the APA. The APA is designed to require some degree of procedure in the administrative process which includes a minimum requirement that there should be public notice of any rule upon which an agency grounds an action involving a particular organization. Classifying plaintiff as an NSA based on a secret rule is such a radical departure from the normal operation of the administrative process that it falls short of compliance with the APA. More precisely, the defendant's July 23rd decision to classify plaintiff as an NSA had no legal justification because the acknowledged basis for the action was secret. Any justification that is later supplied constitutes a textbook example of a post-hoc rationalization which cannot uphold agency action. Thus, defendant's use of a secret rule must be struck down under either the first amendment or the APA.

An Order consistent with the Memorandum Opinion will be entered on this date.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

DATED: August 31, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-2162

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.,
Plaintiff,

—v.—

DONALD J. DEVINE,
Defendant.

ORDER

Upon consideration of plaintiff's motion for summary judgment on all issues except bias as a motivating factor for the challenged action, defendant's cross-motion for summary judgment on all issues, the respective oppositions, the accompanying memoranda of law, the argument of counsel, and the entire record herein, it is this 31st day of August, 1983.

ORDERED that the defendant's motion for summary judgment be, and hereby is, denied; and it is further

ORDERED that plaintiff's motion for summary judgment be, and hereby is, granted; and it is further

ORDERED and ADJUDGED that defendant's reliance on a secret rule to classify plaintiff as an NSA on July 23, 1982, violated plaintiff's rights under the first amendment and the APA; and it is further

ORDERED that defendant, his agents, and employees be, and hereby are, directed to take all necessary steps to enable plaintiff to participate as an ISA in the 1982 CFC to the maximum extent possible; and it is further

ORDERED that the above-captioned matter be, and hereby is, dismissed.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-2118

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. *et al.*,

Plaintiffs,

—v.—

THE HONORABLE DONALD J. DEVINE,

Defendant.

STIPULATION & ORDER

It is hereby stipulated and agreed by the parties, subject to approval of the Court, as follows:

1. The defendant, his agents and subordinates will not exclude plaintiffs Planned Parenthood Federation of America, Inc., and Native American Rights Fund from participation in the Combined Federal Campaign with respect to the solicitation of "designated contributions," as that term is used in the Memorandum Opinion filed July 15, 1983, in *NAACP Legal Defense and Educational Fund, Inc., et al.* v. *Donald J. Devine ("NAACP LDF III")*, on the basis of the provisions of section (2)(b)(1 through 3) of Executive Order No. 12353, as amended by section 1(b) of Executive Order No. 12404 of February 10, 1983.

2. This stipulation is without prejudice to defendant's rights either to appeal from the July 15, 1983, order in *NAACP LDF III* or to seek clarification of that Order insofar as that Order addresses the provisions of section (2)(b)(1 through 3) of Executive Order 12353, as amended by Executive Order 12404,

or in any other respect not enumerated herein. In the event of an appeal from the July 15, 1983, Order in *NAACP LDF III*, defendant will accord to this stipulation the same effect that ultimately is given to the Court's Order of July 15, 1983, in *NAACP LDF III* by any court competent to review that order.

3. The provisions of paragraph 1 of this stipulation have no greater and no lesser force or effect with respect to plaintiffs Planned Parenthood Federation of America, Inc., and Native American Rights Fund than the provisions of the second decretal paragraph of the Court's Order filed July 15, 1983, in *NAACP LDF III,* have with respect to the named plaintiffs in that action. The provisions of paragraph 1 of this stipulation shall be construed in conformity with the Court's July 15, 1983, Memorandum Opinion in *NAACP LDF III.*

4. Plaintiffs hereby withdraw their pending application for a temporary restraining order and agree not to file a motion for a preliminary injunction. The provisions of paragraph 1 of this stipulation shall be construed as a preliminary, and not a permanent, order.

/s/ STANLEY S. HARRIS
Stanley S. Harris
United States Attorney

/s/ ROYCE C. LAMBERTH
Royce C. Lamberth
Assistant United States Attorney

/s/ JOHN D. BATES/*MRB*
John D. Bates
Assistant United States Attorney

/s/ MITCHELL R. BERGER
Mitchell R. Berger
Assistant United States Attorney

/s/ WALTER B. SLOCOMBE
Walter B. Slocombe

/s/ GEOFFREY JUDD VITT
Geoffrey Judd Vitt
Caplin & Drysdale, Chartered

/s/ DONALD J. SIMON
Donald J. Simon
Sonosky, Chambers, Sachse & Guido

Attorneys for Plaintiffs

So Ordered: /s/ JOYCE HENS GREEN
United States District Judge

Date: July 26, 1983

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-2118

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., et al.,

Plaintiffs,

—v.—

THE HONORABLE DONALD J. DEVINE,

Defendant.

ORDER

This matter comes before the Court pursuant to the motion of plaintiff, Planned Parenthood Federation of America, Inc. (Planned Parenthood) for an order to implement this Court's Order of July 26, 1983 which approved the agreement of the parties that Donald J. Devine, Director, Office of Personnel Management, his agents and subordinates

> will not exclude plaintiffs Planned Parenthood Federation of America, Inc., and Native American Rights Fund from participation in the Combined Federal Campaign with respect to the solicitation of "designated contributions," as that term is used in the Memorandum Opinion filed July 15, 1983 in *NAACP Legal Defense and Educational Fund, Inc., et al. v. Donald J. Devine* * * * on the basis of the provisions of section (2)(b)(1 through 3) of Executive Order No. 12353, as amended by section 1(b) of Executive Order No. 12404 of February 10, 1983.

From the record and argument of counsel it appears that Planned Parenthood is the sole remaining agency whose appli-

cation for national eligibility for participation in the Combined Federal Campaign (CFC) has been neither approved nor rejected due to the failure of the defendant Devine to make such determination. The defendant had designated and utilized September 9, 1983 as the latest date for such decision as to all other agencies seeking like participation, in order to afford the rejected agencies time within which to appeal that rejection. Time is crucial in this cause since Director Devine has ordered that after Monday, September 19, 1983, the approximately 550 local committees across the nation may finalize local participant lists for inclusion in printed brochures to be made available to potential donors.

Planned Parenthood, unlike any other applicant agency, has been the target of scrutiny and investigation, purporting to concern unidentified "technical" objections to its eligibility. On August 29 Planned Parenthood received the first of a series of questions concerning its application; Planned Parenthood responded to those questions on August 31. The initial round of inquiries was followed by the National Eligibility Committee hearing at which opponents of Planned Parenthood attacked the substance of Planned Parenthood's programs and views. On September 1, the Director required further inquiry as to whether Planned Parenthood would be admitted, due to what defendant referred to as "potentially disturbing evidence that the group has not met the CFC's financial and reporting requirements." Devine stated that "[t]hat evidence was presented by pro-life representatives during the National Eligibility Committee hearing yesterday." The parties agree that opposition to Planned Parenthood has come essentially from pro-life groups. The hearing continued on September 2; yet more questions were addressed to this agency; yet more answers were given. Despite Planned Parenthood's prompt response to each round of inquiries, defendant has yet to rule on the application. Needless to say, the plaintiffs' appeal rights in the event of a negative decision have been seriously eroded already and will vanish completely unless immediate action is taken. The time pressure exists even in the event of a decision

favorable to Planned Parenthood, in light of the delays in communicating *any* result to the many local campaigns before they finalize participant lists on Monday.

It cannot be overlooked that Planned Parenthood has participated in the CFC each year since 1968 and in 1981 and 1982 was granted national eligibility by defendant Devine. Throughout the prolonged investigation of Planned Parenthood, defendant has stated no specific reason for the extra attention now focused on this agency, aside from the suggestions, without noted evidence supporting them, that financial problems exist and that this is a "controversial" agency. At the eligibility hearing on September 2 defendant stated his own views of Planned Parenthood as follows:

> Everybody knows where I [Director Devine] stand in regard to the kind of practices that Planned Parenthood does. You promote abortions; I think that's detestible. I think in a just world, you'd have nothing to do with a charitable drive.

Indeed, the controversial nature of this organization and the vocal opposition of pro-life groups appear to be either the primary factor delaying a decision, or a paramount consideration in that delayed decision.

Defendant's failure to resolve this matter, despite ample opportunity to do so, and the erosion of time in which to appeal a rejection or notify local campaigns of national eligibility in the event that the application is eventually accepted, amounts to a denial of Planned Parenthood's opportunity to participate in the CFC and is a direct limitation of the Court's Order in this regard.

The Court is not oblivious to the sensitive and sincere positions of the parties, but the controversial nature of the decision cannot obviate the necessity for a fair and equitable decision. All applicants, including Planned Parenthood, must be afforded an equal opportunity to be accepted or rejected, on a reasoned basis, as a national voluntary agency eligible to participate in the CFC.

It is therefore

ORDERED that should the defendant, Donald J. Devine, fail to issue a decision, supported by cogent reasons, resolving Planned Parenthood's application for admittance to the 1983 Combined Federal Campaign by 3:00 p.m., on September 14, 1983, Planned Parenthood shall, automatically and without further order of this Court, be declared to be a national voluntary agency approved for participation in the 1983 Combined Federal Campaign, and this shall be promptly communicated to all local committees nationwide.

/s/ JOYCE HENS GREEN

Joyce Hens Green
United States District Judge

September 14, 1983

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-2118

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. et al.,

Plaintiffs,

—v.—

THE HONORABLE DONALD J. DEVINE,

Defendant.

ORDER

Plaintiff, Planned Parenthood Federation of America, Inc. ("Planned Parenthood") has moved this Court for the entry of an order directing the defendant, Donald J. Devine, to declare Planned Parenthood to be a national voluntary agency approved for participation in the 1983 Combined Federal Campaign (CFC). The history of this case is recounted in the Court's Order of September 14, 1983. In that Order, the Court directed defendant to issue a prompt decision, supported by cogent reasons, as to plaintiff's application. The defendant reached his decision denying plaintiff's application just prior to the 3:00 p.m. time specified by the Court, and plaintiff was advised that it had 10 days to request reconsideration by the defendant pursuant to 5 C.F.R. § 950.407(e) and 48 Fed. Reg. 34914 (Aug. 1, 1983). Planned Parenthood submitted a lengthy request for reconsideration early this morning, September 15, 1983. This request was similarly denied today at approximately 2:30 p.m., at which time the Court indicated it would consider the instant motion as plaintiff's appeal of defendant's decision. The unique and considerable time pressures which accompany this appeal, compel the Court to issue what is, in

essence, a temporary restraining order, rather than a permanent injunction, this date. Plaintiff has demonstrated that it meets the requirements of *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958), and *Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

1. Plaintiff has made a conclusive showing of irreparable injury should relief be denied. Defendant has authorized local committees to finalize participant lists for the CFC on Monday, September 19, 1983. Should plaintiff be finally excluded from the 1983 CFC it will lose this fertile source of financial contributions, approximately half a million dollars in recent years. Moreover, some federal employees will be deprived of the opportunity to donate to the organization of their choice. For a more complete discussion of the extent of the harm to plaintiff if excluded, *see* Orders, July 15, and July 26, 1983.

2. Plaintiff has made a strong showing that is likely to succeed on the merits. Defendant maintains that the "dispositive" reason for the exclusion from the 1983 CFC was that plaintiff did not comply with prescribed accounting practices—the "Standards". However, several other organizations similarly failed to follow exactly those same standards, and nonetheless were *approved* for the CFC program. In his final denial, defendant concedes that "given the complexity of the CFC program, and the limited resources with which it is conducted, it is not inconceivable that inconsistent applications of the regulations may occur." While the Court cannot finalize, without further evidence, the question of compliance with accounting practices or some irregularity, it cannot be ignored that plaintiff has participated for 15 immediate past years in the CFC and that its audit has been completed through examination by a nationally reputable certified public accountant, according to elsewhere accepted guidelines. In light of the differential treatment, the extraordinary and inexplicable delays in the consideration of plaintiff's application, the overall tone of the continuous inquiries, the controversial nature of plaintiff's activities, and defendant's admitted bias against

those activities, the Court must conclude that defendant's proffered grounds for denial are merely pretextual, and directly counter this Court's 1983 Orders, both July 15 and 26.

3. The harm to plaintiff in denying the requested relief overwhelmingly outweighs the harm to defendant in granting it. Exclusion of plaintiff at this stage would be irrevocable. Yet, should the Court subsequently determine that exclusion is indeed warranted, the local committees could simply strike plaintiff from the list of participants.

4. The public interest would be served by the issuance of an order directing plaintiff's inclusion. Federal employees have been invited to contribute to Planned Parenthood since 1968. In 1981 and again in 1982 they have had Dr. Devine's approval of their contributions. These employees certainly do not have to designate funds to Planned Parenthood, but they must be permitted independently to exercise free choice. The public would be otherwise gravely disserved. It is a matter of fairness and forthrightness.

Accordingly, to enable the parties to fully marshal and articulate their arguments in open court with supporting testimony, as appropriate, plaintiff's motion for a permanent injunction will be heard on September 26, 1983, at 1:30 p.m. at the expiration of the temporary restraining order hereby issued—the outside date designated by Dr. Devine for plaintiff to appeal his decision. Supporting papers from either side for the hearing on September 26 must be filed no later than 4:00 p.m., September 22, 1983.

It is ORDERED

that defendant, Donald J. Devine, his employees, agents and any others acting under his direction, be and they hereby are directed to immediately and unequivocally include Planned Parenthood Federation of America, Inc., as a national voluntary agency for participation in the 1983 CFC. This exact Order must be communicated to all local committees across the nation within 24 hours from its issuance to permit plaintiff's

inclusion in the lists to be finalized Monday, September 19, 1983.

Plaintiff, Planned Parenthood Federation of America, Inc., shall post a bond, cash or surety, in the sum of $100.00 no later than 4:00 p.m., Friday, September 16, 1983.

This Temporary Restraining Order has been issued at 5:59 p.m., September 15, 1983, and will expire at 5:59 p.m., on September 26, 1983, unless earlier extended or until further Order of this Court.

/s/ JOYCE HENS GREEN
Joyce Hens Green
United States District Judge

September 15, 1983

No. 84-312

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.,
ET AL., RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF AFFIRMANCE

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In the Supreme Court of the United States
OCTOBER TERM, 1984

No. 84-312

Donald J. Devine, Director,
Office of Personnel Management, Petitioner

v.

NAACP Legal Defense and Educational Fund,
Inc., et al., Respondents.

On Writ of Certiorari to the United States Court
Of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE
OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION

INTEREST OF AMICUS 1/

The American Civil Liberties Union Foundation ("ACLU Foundation") is a national non-profit organization dedicated to the preservation of the rights and liberties embodied in the United States Constitution and, in particular, the Bill of Rights. Through legal counseling and litigation as well as public education, the ACLU Foundation seeks to protect the rights to free expression (particularly the freedom to dissent); equal treatment regardless of race, sex, religion, national origin, or physical handicap; fair play in encounters with government institutions; and privacy.

The ACLU Foundation provides legal assistance to individuals who, because of the prohibitive cost of constitutional

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1/ The parties' letters of consent have been lodged with the Clerk pursuant to Supreme Court Rule 36.2.

litigation, would otherwise be unable to press their claims. Through litigation, the ACLU Foundation provides a voice for minorities and those who espouse unpopular causes, who otherwise go unheard in the majoritarian branches of government. Like the respondent legal defense funds, the ACLU Foundation engages in no partisan political activities, but it does engage in advocacy through litigation.

The ACLU Foundation is a charitable entity organized, qualified, and recognized by the Internal Revenue Service under 26 U.S.C. § 501(c)(3) (1982). This year, the ACLU Foundation is a participating charity in the Combined Federal Campaign ("CFC" or "the Campaign"), pursuant to the regulations adopted by the Office of Personnel Management. 2/

2/ 5 C.F.R. Pt. 950, 49 Fed. Reg. 32,735 (1984).

The interest of the ACLU Foundation in this case thus is twofold. First, it is of vital concern that the First Amendment rights of the respondent legal defense funds be protected from petitioner's attempt to bar them from carrying their message to federal employees in the CFC. Second, because the CFC is the exclusive means of on-the-job charitable solicitation of federal employees, the ACLU Foundation has a strong interest in continued participation in the CFC in order to enhance its ability to defend the rights of the underrepresented.

SUMMARY OF ARGUMENT

The Combined Federal Campaign is the exclusive means of on-the-job charitable solicitation of federal employees. At issue in this case is whether respondent health and welfare charities, otherwise eligible to participate in the Campaign, may be excluded from carrying their message to federal

employees in the Campaign brochure solely because they use litigation to advance public policy goals.

Charitable solicitation through the CFC is expressive activity protected by the First Amendment because it serves the purposes of conveying information and seeking support for particular causes. See Secretary of State v. Joseph H. Munson Co., 104 S. Ct. 2839, 2849 (1984); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980).

Petitioner's attempt to bar respondents' participation in the CFC violates the First Amendment because it is not reasonably tailored to achieve significant government interests and does not leave open ample alternative channels of communication. This is the appropriate standard against which to weigh the government's conduct, even if the attempted ban on speech is content-neutral, because the

CFC is a limited public forum under this Court's cases.

"The existence of a right to access" to a government facility "and the standard by which limitations upon such a right must be evaluated differ depending on the character" of the facility. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983). The Court should look to the character of the Campaign, not of the federal workplace as petitioner contends, in its First Amendment analysis. Contrary to petitioner's assertions (Pet. Br. at 23 n.18), respondents do not seek unrestricted access to federal property to solicit funds from federal employees. Rather, respondents seek inclusion in the Campaign brochure, which is an unintrusive means of conveying their message. Thus, the Campaign itself, and specifically the brochure, is the proper forum for this Court's First Amendment analysis.

In Perry, the Court distinguished three types of forums: traditional public forums, limited public forums, and nonpublic forums. Limited public forums are those used for purposes of communicating thoughts and discussing public questions which have been limited to "use by certain groups * * * or for the discussion of certain subjects." Perry, 460 U.S. at 46 n.7 (citations omitted). Under this Court's forum cases, the CFC is a limited public forum created for expressive activity -- charitable solicitation -- by health and welfare charities because: 1) the CFC was designed for and dedicated to that expressive activity; and 2) the statements respondents seek to make in the Campaign brochure are fully compatible with the activity of the Campaign.

Petitioner contends that the Campaign was designed only for "traditional health and welfare charities," but the

"traditional" requirement is not to be found in the Executive Orders or regulations governing the CFC before promulgation of the Executive Order at issue. Moreover, access to the Campaign has not been so limited and selective that the CFC is a nonpublic forum. Compare Perry and Widmar v. Vincent, 454 U.S. 263 (1981). In contrast with the selective access cases, access to the CFC for expressive activity has been granted to a broad range of health and welfare charities and such access does not serve the proprietary mission of the federal workplace. Respondents here are within the category of charities for which the forum was created.

The exclusion of respondents from the CFC is not reasonably tailored to achieve significant government interests because none of the three justifications offered by petitioner supports the exclusions. The exclusion does not leave open ample

alternative channels of communication because the CFC is the exclusive means of on-the-job solicitation of federal employees.

ARGUMENT

Preliminary Statement

The issue in this case is whether charities that serve health and welfare purposes by means that include litigation can be excluded from a government-created forum for charitable solicitation solely because they litigate. At stake is not just a source of revenue for organizations such as respondent legal defense funds, but whether the government may selectively prohibit the exercise of protected speech in the Combined Federal Campaign because it disapproves of the use of litigation to advance public policy goals.

In this brief in support of respondents, the ACLU Foundation addresses principally the status of the CFC as a

limited public forum under this Court's case law. The underpinning of petitioner's forum argument is his portrayal of the CFC as "a context in which the First Amendment interests of groups that wish to participate are decidedly weak." (Pet. Br. at 28.) Such belittling of the First Amendment interests at stake is contrary to this Court's cases affording First Amendment protection to charitable solicitation of the kind involved here.

Petitioner's contention that the Campaign does not involve "a significant amount of expression" (Pet. Br. at 29 n.22) blinks reality. Under the regulations at issue, 3/ face-to-face solicitation by

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3/ The regulations governing the Campaign are codified at 5 C.F.R. Pt. 950 (1984). The regulations have since been amended at 48 Fed. Reg. 29,458 (1983) and 49 Fed. Reg. 32,735 (1984). Unless otherwise indicated in the text, the description of the CFC and

[Footnote continued]

eligible charities is not permitted. 5 C.F.R. § 950.507(a). 4/ The only opportunity for an eligible charity to inform employees through the Campaign materials of its eligibility to receive designated funds and its mission is the Campaign brochure, which "list[s] each voluntary agency approved by the appropriate Federal officials for participation in the CFC with a brief statement of about 30 words on its

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3/ [Footnote continued]

regulation citations refer to the Campaign prior to the 1983 and 1984 amendments to the regulations.

4/ Federal employees are provided a package of Campaign and publicity materials, including a pledge form and withholding authorization form. 5 C.F.R. § 950.521. The materials inform employees "of their right to make a choice" to designate an eligible charity as the recipient of their contributions. Id. at § 950.521(c). Employees are informed that the government encourages them to make a choice rather than to make undesignated contributions. Id.

programs." 5 C.F.R. § 950.521(e)(2). 5/ In the 30-word statements, eligible organizations present themselves and their goals, priorities, and accomplishments so that federal employees will have a sound basis for deciding which organizations to designate.

Like the other forms of charitable solicitation this Court has considered, the statements of charitable solicitation at issue here are "so intertwined with speech that they are entitled to the protections of the First Amendment." Secretary of State v.

5/ Of course, the brochure need not be read by employees on the job. It can be taken home or reviewed during nonworking time. Because charities participating in the Campaign convey their messages in writing, disruption is minimal. Any employee who is offended by the brochure "may escape exposure to [the] objectionable material simply by transferring [it] from envelope to wastebasket." Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 542 (1980) (footnote omitted). Accord, Bolger v. Youngs Drug Products Corp., 103 S. Ct. 2875, 2883 (1983).

Joseph H. Munson Co., 104 S. Ct. 2839, 2849 (1984). Accord, Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980). The brochure statements provide information to potential donors in a context which makes clear that the statements constitute a request for funds to support the litigation and other activities undertaken by the legal defense funds concerning issues of public importance. Despite petitioner's disparagement of the "expressiveness" of the brochure statements, he can provide no basis in the Court's precedents nor in logic for suggesting that face-to-face solicitation is

more deserving of First Amendment protection than the written statements at issue here. 6/

I. The Combined Federal Campaign Is A Limited Public Forum.

A. The Campaign Itself -- Not the Federal Workplace -- Is The Relevant Forum For Purposes Of First Amendment Analysis.

To decide whether petitioner's exclusion of respondents from the Campaign violates the First Amendment, the Court first determines the standard by which the government's restriction on speech is to be judged. The standard to determine the validity of a ban on First Amendment

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6/ It cannot be gainsaid that federal employees, too, have a First Amendment interest in the charitable solicitation involved in the CFC. Federal employees have the First Amendment right to contribute to the charities of their choice. National Black United Fund, Inc. v. Campbell, 494 F. Supp. 748, 755 (D.D.C. 1980) ("a donation to these charities [in the CFC] is an expression of and reflects the interests and preferences of the donor government employee"), rev'd on other grounds sub nom. National Black United Fund, Inc. v. Devine, 667 F.2d 173 (D.C. Cir. 1981).

protected speech depends in part on the character of the Campaign. We agree with petitioner that Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), in which the Court distinguished the standards applicable to different forums for expressive activity, is the proper starting point for analysis.

Petitioner, however, describes the "federal workplace," rather than the Campaign, as the forum "to which respondents ultimately seek access." (Pet. Br. at 23 n.18.) This completely misrepresents respondents' position in this case. Respondents have never sought "to allow the public unrestricted access to federal property to solicit funds from federal employees." (Pet. Br. at 25.) 7/

7/ Indeed, petitioner's argument that the CFC furnishes little opportunity for

[Footnote continued]

Respondents simply seek access to the brochure through which they can solicit designated funds, because the Campaign regulations close the federal workplace to charitable solicitation except through the Campaign. 5 C.F.R. § 950.507(a). This is not a case about charitable solicitation face-to-face in the hallways at the CIA or door-to-door at the Department of Justice.

The government created the CFC to provide a channel for charitable solicitation that is so unobtrusive and highly regulated by time, place, and manner restrictions that it can be conducted consistent with even the

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7/ [Footnote continued]

expressive activity (Pet. Br. at 17, 26-27) is inconsistent with his claim that respondents seek unrestricted access to federal property and granting them that access would create disruption at the federal workplace.

most sensitive government employment. 8/ Petitioner cannot have it both ways. Once the government limits charitable solicitation in the federal workplace to the CFC, the restrictions it places on speech within the Campaign must be weighed in the context of the forum it has created.

8/ As petitioner admits, the Campaign was created expressly for the purpose of regulating access to the federal workplace for charitable solicitation. (Pet. Br. at 4-5.) Prior to President Eisenhower's Executive Order No. 10,728 in 1957, which established the first procedures and standards for a uniform fundraising program, charitable solicitation was conducted on an ad hoc basis which included access to some federal facilities for on-the-job charitable solicitation. (Pet. Br. at 4-5.) President Kennedy's Executive Order No. 10,927 "directed that all ad hoc solicitations be ended, and that worthy charities be permitted to solicit in the Federal workplace through a single annual drive combining all participating agencies. Thus was born the Combined Federal Campaign." Statement of Donald J. Devine before the Subcomm. on Manpower and Housing of the House Comm. on Governmental Operations, 98th Cong., 1st Sess. (1983) (J.A. 309).

Every court which has considered a First Amendment forum issue in the context of the CFC has held or assumed that the CFC is the relevant forum. 9/ The district court in this case recognized that "'by providing organizations the opportunity to participate in the CFC, the government has, in effect, provided a billboard or channel of communication through which organizations can disseminate their appeals to federal workers.'" NAACP Legal Defense and Educational Fund, Inc. v. Devine, 567 F. Supp. 401, 406-07 (D.D.C. 1983), quoting NAACP Legal Defense and Educational Fund,

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9/ See NAACP Legal Defense and Educational Fund, Inc. v. Devine, 727 F.2d 1247, 1257 n.11 (D.C. Cir. 1984); NAACP Legal Defense and Educational Fund, Inc. v. Devine, 567 F. Supp. 401, 406 (D.D.C. 1983); NAACP Legal Defense and Educational Fund, Inc. v. Campbell, 504 F. Supp. 1365, 1367 (D.D.C. 1981); National Black United Fund, Inc. v. Campbell, 494 F. Supp. at 755. See also Black United Fund of New Jersey, Inc. v. Kean, 593 F. Supp. 1567, 1574 (D.N.J. 1984).

Inc. v. Campbell, 504 F. Supp. 1365, 1367 (D.D.C. 1981).

The repeated judicial acknowledgment of the CFC, not the federal workplace, as the relevant forum fully conforms to the approach taken by this Court in its First Amendment cases. 10/ For example, in Widmar v.

10/ The only citation offered by petitioner in support of the notion that the federal workplace as a whole is the relevant forum is U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760, 764 (D.C. Cir. 1983) (hereinafter "Namibia"), in which the court held that the FAA could not bar political advertising in display cases at Dulles International Airport and Washington National Airport. Because the display cases were facilities "'separated' from the terminals only by glass panels or translucent plexiglass whose sole purpose is to frame or project messages of outside organizations to the terminals' public users", the court refused to look at the display cases as totally separate from the public airport terminals in which they were located. Id. at 764. Namibia thus is consistent with this Court's teachings that a forum should not be viewed in isolation from its context. E.g., Widmar v. Vincent, 454 U.S. 298, 267 n.5 (1981); Lehman v. City of Shaker Heights, 418 U.S. 298, 303-04 (1974).

[Footnote continued]

Vincent, 454 U.S. 263 (1981), the Court held that a university which routinely provides university facilities for meetings of registered student organizations has created a forum generally open for use by student groups. The Court analyzed the First Amendment rights at issue in terms of student meeting facilities and observed: "We have not held * * * that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings." Id. at 267 n.5.

Similarly, in Perry, the Court defined the issue as whether the First Amendment requires that access to a "certain means of communication" within a public

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10/ [Footnote continued]

However, the court's holding in Namibia was limited to its "analysis of display advertising at these airports." 708 F.2d at 773.

school -- the interschool mail service and mailboxes -- must be granted to a rival union if it is open to the teachers' certified bargaining representative. 460 U.S. at 44. As the court of appeals recognized in this case, "the Supreme Court's analysis [in Perry] of school mail box facilities as a forum * * * -- as opposed to the school itself -- suggests that the CFC is the relevant forum." NAACP Legal Defense and Educational Fund, Inc. v. Devine, 727 F.2d 1247, 1257 n.11 (D.C. Cir. 1984). 11/

11/ In dissent from the court of appeals' decision, Judge Starr cited Lehman and Greer v. Spock, 424 U.S. 828 (1976), for the proposition that a forum cannot be viewed in isolation from its context. NAACP Legal Defense and Educational Fund, Inc., 727 F.2d at 1271 (Starr, J., dissenting). The principle is correct, but the focus of analysis only shifts to the larger context, as in Greer, when the expression is so intrusive as to dominate or interrupt the normal functioning of the property. Here, by contrast, the CFC was created expressly to prevent such interruption in the operation of the workplace.

The CFC is conducted at places of government employment. But because the CFC, by design, protects the federal workplace from intrusion for charitable solicitation, the CFC itself, and not the workplace, is the forum at issue.

B. The Campaign Is A Limited Public Forum Designed For And Dedicated To Expressive Activity By Speakers Such As Respondents.

In Perry, the Court distinguished three types of forums for expressive activity: traditional public forums, limited public forums, and nonpublic forums. The standard which is used to determine the validity of a ban on First Amendment protected speech is determined in part by the type of forum the government has created.

The first type of forum, the traditional public forum, is comprised of those means of communication or places which "by long tradition or government fiat have been devoted to assembly and debate." 460

U.S. at 45. Accord, United States v. Grace, 103 S. Ct. 1702, 1707 (1983). In this category are streets, sidewalks, and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Id. (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)). 12/

Second, "[a] public forum may be created for a limited purpose such as use by certain groups, e.g., Widmar v. Vincent, (student groups) or for the discussion of certain subjects, e.g., City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n [429 U.S. 167

12/ Accord United States Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114, 133 (1981) ("Congress * * * may not by its own ipse dixit destroy the 'public forum' status of streets and parks which have historically been public forums").

(1976)] (school board business)." Perry, 460 U.S. at 46 n.7. Although the government is not required to retain indefinitely the open character of a limited public forum, "as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." Id. at 46.

Finally, a nonpublic forum is not by tradition or designation a forum for public communication. Id. at 46.

Under this Court's forum cases, the CFC is a limited public forum expressly created for expressive activity by certain groups: those that provide health and welfare services to those in need.

In order to determine whether the government has created a public forum, limited or otherwise, this Court has examined

the nature of the forum in light of two factors. First, the Court has determined whether the forum has been "designed for and dedicated to expressive activities." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975). 13/ The CFC was designed and designated for charitable solicitation by health and welfare charities. Second, the Court has determined whether expressive activity within the forum "is basically incompatible with the normal

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13/ Accord, Widmar, 454 U.S. 263 (through policy of accommodating student group meetings held in university facilities, university created forum generally open to use by student groups); Heffron, 452 U.S. 640 (Minnesota State Fair was limited public forum in that it was designed to provide means for great number of exhibitors to present their views to large audience); City of Madison Joint School Dist., 429 U.S. 167 (school board business meetings opened by state for direct citizen involvement constituted public forum). Cf., Haque, 307 U.S. 496 (resting availability of a given locale for expressive activity upon its historical role as an arena for public expression).

activity of [that] particular place at [that] particular time." Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). The expressive activity at issue is expressly permitted in the regulations governing the Campaign. Thus, the CFC is within the public forum category as a limited public forum for expressive activity by health and welfare charities.

1. The Combined Federal Campaign Was Designed For And Dedicated To Expressive Activity.

One indication that the government purposefully has designed and designated a forum for expressive activity is that the government has a policy of allowing all organizations, or all organizations within a certain group, to use it without each entity having to obtain separate permission. Perry, 460 U.S. at 47. A public forum also may exist if each organization must obtain permission from the government, but such permission is granted as a matter of course.

Id. See also Widmar, 454 U.S. at 267-68. The CFC was designed for and dedicated to expressive activity -- charitable solicitation -- and has been made available as a matter of course to health and welfare charities.

Petitioner has engaged in revisionist history in an effort to demonstrate that the CFC was not designed or designated as a forum for expressive activity. Petitioner first asserts that the history of the Campaign evidences no intent on the part of the government to allow the public unrestricted access to federal property. (Pet. Br. at 25.) The conclusion is correct but irrelevant. As shown above, this case does not involve indiscriminate public access to federal property; it involves access to a limited forum designed and dedicated as a forum for charitable solicitation. There can be no doubt that the forum is designed for and dedicated to

expressive activity -- charitable solicitation -- by health and welfare charities. That is the Campaign's sole purpose.

The petitioner next strives to justify excluding respondents from the expressive activity allowed in the Campaign by characterizing the CFC as a forum which was created for and limited to "traditional health and welfare charities." (Pet. Br. at 19-21.) Petitioner argues that the CFC is a nonpublic forum that is not open to respondents.

In determining the scope of a forum, the Court should look to what the government has done, not to what it now says. In fact, the CFC has not been so limited; the restriction on legal defense fund participation at issue here was adopted in 1983. No earlier Executive Order or regulation limited participation in the

Campaign to "traditional health and welfare charities" or even used that terminology. 14/

President Kennedy's Executive Order creating the CFC extended the opportunity to solicit funds through the Campaign to "such national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate* * * ." Executive Order No. 10,927. The Executive Order did not purport to limit the CFC to "traditional health and welfare charities." To the contrary, it nowhere used the word

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14/ Even assuming the forum is limited to traditional health and welfare charities, petitioner still is not free to draw arbitrary or unreasonable distinctions among charitable organizations "of similar character." Perry, 460 U.S. at 48. As the court of appeals concluded, "appellees [legal defense funds] and the included charities share the traits that have traditionally been considered critical in determining eligibility for the CFC: all provide and support 'direct health and welfare services.'" NAACP Legal Defense and Educational Fund, Inc., 727 F.2d at 1258. See supra note 19 and accompanying text.

"traditional" and contemplated inclusion of "other national voluntary agencies" as well as "voluntary health and welfare agencies."

Two respondents applied to participate in the 1980 Campaign and were excluded. Participation was barred only by the "direct services" criterion for national service agencies, a criterion no longer relevant and not at issue here. 15/

Petitioner expressed his opposition to participation of legal defense funds in the fall 1981 Campaign, but acknowledged that such participation was required under the regulations and the court decision striking down the "direct services" requirement (which

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15/ Two respondents successfully challenged the "direct services" requirement in NAACP Legal Defense and Educational Fund, Inc. v. Campbell, 504 F. Supp. 1365 (D.D.C. 1981). The court, in striking down the requirement, observed that "defendant contended that the plaintiffs, while otherwise qualified, do not provide direct services, but rather serve as advocates for groups." Id. at 1366 (emphasis added).

the government did not appeal). (J.A. 56-59.) See supra note 14. Several legal defense funds, including four of the present respondents, participated in the fall 1981 Campaign. 16/

The Executive Order at issue here was the first statement of Campaign eligibility criteria that ever purported to exclude from the definition of charitable health and welfare agencies those organizations "that seek to influence * * * the determination of public policy through * * * litigation on behalf of parties other

16/ Under Executive Order 12,353, issued in 1982, and the 1982 CFC regulations, 5 C.F.R. § 950.101(a) (1983), legal defense funds continued to participate in the CFC as organizations that provide health and welfare services. The regulations expressly defined "national voluntary health and welfare agencies" to include those involved in "[d]elivery of legal services to the poor and indigent, and defense of human and civil rights secured by law". Id. Accordingly, all respondent legal defense funds participated, without challenge by petitioner Devine, in the Campaign held in fall 1982.

than themselves * * *." Exec. Order No. 12,404 (1983). After two years of active Campaign participation by legal defense funds and prior non-participation by choice or application of an illegal "direct services" requirement, Executive Order No. 12,404 attempted to close the CFC to health and welfare charities that litigate in the public interest.

The "traditional health and welfare charity" talisman is a latter-day contrivance. The Campaign has never been limited to such groups (if, indeed, the government could define what groups that term includes). Petitioner should not be permitted to bootstrap his own unreasonable bar on legal defense fund participation in the CFC into a definition of the forum at issue. See Widmar, 454 U.S. at 268-69; cf. City of Madison Joint School District, 429 U.S. at 174-76.

2. Expressive Activity Within The Forum, The Combined Federal Campaign, Is Compatible With The Normal Activities Of The Forum.

As demonstrated in part A above, the CFC itself is the relevant forum for purposes of First Amendment analysis. The expressive activity in which legal defense funds seek to engage -- the 30-word statement in the Campaign brochure -- is not only compatible with the Campaign, it is expressly permitted in the Campaign regulations as the single means of expression afforded to the participating charities. The second prong of the public forum test -- compatibility -- thus is self-executing. 17/

17/ Even if the expression at issue is viewed in the context of the federal workplace, as petitioner would have it, it still is compatible with the normal activities of the time and place in which it occurs because the brochure is so nonintrusive. See supra note 5.

3. Access To The Forum Has Not Been So Selective That The Forum Is Nonpublic.

Petitioner asserts that the CFC should be seen as a basically non-expressive activity in the federal workplace in which the government has permitted select groups to engage. (Pet. Br. at 23-29.) Petitioner thus attempts to harmonize the circumstances of this case with the "selective access" cases in which the government provided particular groups with selective access to a forum without creating a public forum as a result. (Pet. Br. at 26-27.) Petitioner relies upon Perry; Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Greer v. Spock, 424 U.S. 828 (1976); and Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). The deliberate creation of the CFC as a forum for charitable solicitation open to all health and welfare charities is unlike the "selective access" involved in those cases because expressive

activity associated with the CFC involves broad and systematic access to health and welfare charities rather than selective access, and on-the-job solicitation does not advance the government's proprietary mission. Moreover, respondents are "similar in character" to charities for which the forum was created. Perry, 460 U.S. at 48.

In Perry, this Court upheld a collective bargaining agreement which gave the exclusive bargaining representative access to the interschool mail system and denied such access to a rival organization. The Court concluded that the internal mail system was not a public forum and exclusive use was necessary to permit the bargaining representative to perform its responsibilities effectively and was consistent with preserving the property for its dedicated use. 460 U.S. at 47-48, 50-51. Although the rival union had previously been given access to the mail

facilities, its status changed when another union became the exclusive representative. Id. at 48. It was not the forum but the rival union's status that changed, from a representative of some of the teachers to a rival of the teachers' exclusive representative. Id. Thus, consistent with "the School District's preservation of the facilities for school-related business," the rival union could be excluded. Id. 18/ No

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18/ Of course, the government has the same rights as a private property owner to safeguard property for the uses to which it is dedicated. Adderly v. Florida, 385 U.S. 39, 40 (1966). The government's right to exclude expressive activity is greatest when it is acting in a purely "proprietary" capacity. E.g., Lehman, 418 U.S. 298. When the government permits expression which merely furthers the business or mission of the property, it is exercising its proprietary role, and its interest is not readily superseded by an obligation to protect the exchange of ideas. The expression allowed by the government in the CFC is not in furtherance of the purpose of the federal workplace -- to get the government's work done. The government has

[Footnote continued]

such difference in status sets legal advocacy organizations apart from other health and welfare charities. 19/

Although the record in Perry demonstrated isolated instances of access to the mail facilities by a limited number of outside organizations, there was no specific policy or practice that the mail system be open to the general public or to employee organizations. Id. at 47. These isolated instances of outside access did not turn the

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18/ [Footnote continued]

opened up the workplace for the CFC and thus has created a channel of public access that is open to a freer flow of ideas than the workplace itself.

19/ As the court of appeals stated: "[T]here is no discernible difference in the status of the appellees and that of the organizations which have been permitted access to the CFC * * *. [A]ppellees and the included charities share the traits that have traditionally been considered critical in determining eligibility for the CFC: all provide and support 'direct health and welfare services.'" NAACP Legal Defense and Educational Fund, Inc., 727 F.2d at 1258.

mail facilities into a public forum because they involved groups that advance the purposes of a school. In contrast, the CFC is a highly organized means of access created to permit expressive activity through charitable solicitation by health and welfare charities. Moreover, the outside groups that used the facilities in Perry were "organizations that engage in activities of interest and educational relevance to students" and not concerning the "terms and conditions of teacher employment." Id. at 48. 20/ In alternative reasoning, the Court observed that granting access to such student-related organizations would extend a constitutional right of access "only to other

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20/ Cf. Ysleta Fed'n of Teachers v. Ysleta Independent School Dist., 720 F.2d 1429 (5th Cir. 1983) (once school opened mail system to all employee organizations without distinction it became bound by constitutional standards applicable to traditional public forum).

entities of similar character." Id. at 48. No such distinction separates respondents from participating charities. Respondents, like other health and welfare charities, serve the poor and needy. See infra parts II.A. and B. 21/

The Court in Jones considered the constitutionality of prison regulations prohibiting inmates from engaging in labor union activity. The Court, noting "the operational realities of a prison," found the regulations consistent with "reasonable considerations of penal management." 433 U.S. at 126, 132. The Court found no difficulty with the fact that certain service organizations, such as Alcoholics Anonymous and the Jaycees, had been afforded bulk

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21/ There also were "substantial alternative channels" open for communication by the rival union in Perry. 460 U.S. at 53. There is no means of on-the-job charitable solicitation at the federal workplace other than the CFC. See infra part II.B.2.

mailing and meeting rights while the union had not, because the activities of the service organizations were consistent with the rehabilitative mission of the prison and posed no threat to its ordered security. 433 U.S. at 133-36. As in Perry, the Court in Jones looked to the consistency of the speech with the mission of the institution, a difference in the relationship of the included and excluded speech to that mission, and the relatively minor and casual nature of the prior access, and concluded that the granting of selective access to a small number of service organizations did not operate to create a public forum. Id. at 134.

In Greer, the Court upheld a military base regulation banning partisan political speeches and demonstrations. While much of the facility was open to the public, military police patrolled all areas and the Army had not abandoned any claim of control over political speech on the facility. The

commander therefore could exclude proposed face-to-face solicitation of trainees "to avert what he perceive[d] to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command." 424 U.S. at 840. The government was not obliged to permit expressive activity that would conflict with the primary purpose for which the property was intended. Id. at 837-40; 840-42 (Burger, C. J., concurring); 842-49 (Powell, J., concurring).

In Lehman, a plurality of this Court upheld a city policy that allowed commercial advertising in city-owned transit cars but prohibited political advertising. The plurality held that the denial of all political advertising was a business decision made by the government in its proprietary capacity. The nature of the system as a business venture with a captive audience belied Lehman's contention that the system constituted a public forum. The case thus

turned on the plurality's belief that the government possessed the managerial discretion to permit commercial advertising without obligating itself to display partisan political messages, 418 U.S. at 303-04, and Justice Douglas' sensitivity to the "captive audience" of streetcar riders. Id. at 305-08 (Douglas, J., concurring). 22/

Unlike Perry, Jones, Greer, and Lehman, this case does not involve selective access to a forum evincing the government's intent to reserve the forum for proprietary purposes. 23/ Providing limited access to particular civic or service organizations (as

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22/ The "captive audience" is not a problem in the CFC. See supra note 5.

23/ It cannot be seriously argued that in creating the CFC, the government has acted to further the mission or object of the federal workplace (except in the indirect sense of avoiding the disruption incident to ad hoc charitable solicitation). The government is not operating the CFC as a commercial venturer.

the goverment did in Perry, Jones, and Greer) or providing access only to commercial entities (as it did in Lehman) which further the mission or object of the facility differs fundamentally from providing access, year in and year out, to large numbers of charitable organizations for expressive activity through the CFC. Here, the function of the CFC expressly includes serving as a platform for expressive activities. The CFC thus is a limited public forum for health and welfare charities to solicit contributions through the Campaign. Finally, even if access to the forum is selective, the government may not exclude respondents because they are entities similar in character to those to which access has been granted.

II. The Exclusion Of Legal Defense Funds From The CFC Violates The First Amendment.

As long as a limited public forum remains open for speech, the government "is bound by the same standards as apply in a

traditional public forum." Perry, 460 U.S. at 46. The government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are reasonably tailored to achieve a significant government interest, and leave open ample alternative channels of communication." United States v. Grace, 103 S. Ct. at 1707. "A content-based prohibition must be narrowly drawn to effectuate a compelling state interest." Perry, 460 U.S. at 46 (quoting Widmar, 454 U.S. at 269-70). The exclusion of legal defense funds from the CFC cannot withstand scrutiny under this test.

A. Petitioner's Exclusion Of Legal Defense Funds From The CFC Is A Content-Based Restriction On Speech.

Petitioner's attempted exclusion of legal defense funds from the CFC fits squarely within this Court's traditional understanding of a content-based restriction on speech. Petitioner admits that he seeks

to deny legal defense fund participation because such groups "wish to advance * * * a particular cause." Pet. Br. at 7 n.6. In utilizing this rationale, petitioner embraces the "power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Department of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (citations omitted). Petitioner does not seek to exclude "legal aid societies" which litigate, but not, in his view, to advance particular causes. Pet. Br. at 7 n.6. Petitioner seeks to justify his distinction on the ground that legal defense funds propound causes or "messages" through litigation. 24/ This different treatment of

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24/ Petitioner's distinction between legal defense funds and other charitable organizations, whether on the grounds that only one promotes a particular cause or that only one provides services to the needy, fails to survive analysis. Many of the

[Footnote continued]

otherwise equally expressive activity based on the government's view that disfavored speakers explicitly advocate a cause has the clear design of silencing that advocacy. It is, in the most literal sense, content-based regulation of speech.

24/ [Footnote continued]

organizations favored by petitioner's regulations spend the funds raised to help a discrete group or to eradicate a particular problem, not to benefit the indigent generally. That they "[distinguish] * * * on the basis of a particular cause," Pet. Br. at 7 n.6, is thus a spurious ground on which to single out legal defense funds. Furthermore, it is beyond dispute that groups like the respondent legal defense funds aid the needy. The mandate of many legal defense funds, such as the ACLU Foundation, is to vindicate constitutional rights. See In re Primus, 436 U.S. 412, 428-29 (1978) (the ACLU "has represented individuals in litigation that has defined the scope of constitutional protection in areas such as political dissent, juvenile rights, prisoners' rights, military law, amnesty, and privacy"). Those forced to secure their constitutional rights through litigation are often unable to pay the very high cost of such litigation. Legal defense funds therefore customarily serve the needs of the indigent who otherwise might be unheeded.

Moreover, petitioner's exclusion of legal defense funds is in no way viewpoint-neutral. Legal defense funds typically are created to express the view of a particular segment of citizens:

> Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. * * * And under the conditions of modern government, litigation may be the sole practicable avenue open to a minority to petition for redress of grievances. * * * [T]he litigation [the NAACP] assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society.

NAACP v. Button, 371 U.S. 415, 429-31 (1963).

The role of legal defense funds is to invoke judicial intervention on behalf of such minorities; they amplify the voice of the underrepresented who cannot obtain an equal share through petitioning their elected

representatives. 25/ Petitioner's restriction thus discriminates against the viewpoint of minorities and the underrepresented:

> [A] statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however evenhanded its terms appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens.

Button, 371 U.S. at 435-36. Petitioner's exclusion of legal defense funds from the CFC, by suppressing the goal of the underrepresented to gain representation, is thus a classic viewpoint-based restriction of speech.

25/ "[J]udicial intervention becomes appropriate when the existing processes of representation seem inadequately fitted to the representation of minority interests, even minority interests that are not voteless." J.H. Ely, Democracy and Distrust 86 (1980).

B. Even If Petitioner's Exclusion of Legal Defense Funds Were Content-Neutral, It Could Not Be Upheld.

Even if the exclusion of legal defense funds from the CFC were not content-based, the exclusion does not satisfy this Court's standard for restricting expressive activity in a limited public forum, i.e., that the exclusion is reasonably tailored to achieve significant government interests and leaves open ample alternative channels of communication. 26/

26/ The court of appeals concluded that petitioner's exclusion of legal defense funds could not even withstand the reasonableness test applied in nonpublic forum cases. NAACP Legal Defense and Educational Fund, Inc., 727 F.2d at 1257-68. The facts surrounding the petitioner's justifications for the exclusion are detailed by the courts below and in the Brief for the Respondents and will not be repeated at length here.

1. The Exclusion Of Legal Defense Funds Is Not Reasonably Tailored To Achieve Significant Government Interests.

Petitioner asserts three purposes putatively served by the exclusion of legal defense funds from the CFC:

> [1] lessening the burden of government and local communities in meeting human health and welfare needs; [2] minimizing disruption of the federal workplace and costs of fundraising; and [3] avoiding the reality and appearance that federal resources are being used to advance partisan causes.

(Pet. Br. at 18.) The exclusion of all legal defense funds from the CFC is neither reasonably tailored nor does it achieve any significant government interest.

First, as shown above, supra at part II.A., in Respondents' Brief, and in the decision of the court below, 727 F.2d at 1259-60, legal defense funds clearly serve the needy and provide health and welfare services through their litigation efforts.

As said in the context of an argument similar to that advanced here:

> The law favors charitable organizations because they perform public services that relieve the public sector pro tanto from a burden that otherwise would be imposed upon it * * *. The common element in all charitable organizations is that they are designed to accomplish objectives which are beneficial to the community and area * * *.
>
> In weighing the benefit rendered, the court does not decide whether the organization is taking the wisest course in trying to help the community; nor is the popularity of the organization's cause determinative.

National Right to Work Legal Defense and Education Foundation, Inc. v. United States, 487 F. Supp. 801, 807 (E.D.N.C. 1979).

Second, petitioner argues that the exclusion of legal defense funds serves to minimize disruption by eliminating "controversial" organizations from the CFC. Not only is this purpose not a significant governmental interest, "it is an

impermissible basis for a restriction upon speech." NAACP Legal Defense & Educational Fund, Inc., 567 F. Supp. at 408 (emphasis in original). As has been noted in another context, the use of the controversial nature of speech as the touchstone for regulation "threatens a value at the very core of the First Amendment, the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 548 n.9 (1980) (Stevens, J., concurring) (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

Finally, petitioner argues that his exclusion of legal defense funds is necessary to avoid conveying the impression that the government is endorsing partisan political activity. This Court has expressly rejected this contention as a justification for suppressing speech. See Widmar, 454 U.S. at

274 & n.14. ("[a]n open forum in a public university does not confer any imprimatur of state approval on religious sects or practices"). Moreover, this Court has pointed out that the availability of disclaimers of government support undercuts the validity of a speech restraint. See FCC v. League of Women Voters, 104 S. Ct. 3106, 3125 (1984); Widmar, 454 U.S. at 274 n.14; U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760, 771-72 (D.C. Cir. 1983). The government has the same alternative in this case.

2. The Exclusion Of Legal Defense Funds Does Not Leave Open Ample Alternative Channels Of Communication.

"A restriction on expressive activity may be invalid if the remaining modes of communication are inadequate." Members of the City Council of Los Angeles v. Taxpayers for Vincent, 104 S.Ct. 2118, 2133 (1984). Accord, United States v. Grace, 103

S. Ct. at 1711; Southeastern Promotions, Ltd. v. Conrad, 420 U.S. at 5560. See also Schneider v. State, 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").

The CFC is "the exclusive forum for charitable solicitation in the Federal workplace, and * * * a critical medium for making charitable appeals to Federal employees." NAACP Legal Defense & Educational Fund, Inc., 727 F.2d at 1265 (emphasis in original). Moreover, contrary to petitioner's assertion (Pet. Br. at 14), the court of appeals did not conclude that the availability of alternative fora "was essentially irrelevant to analysis of the reasonableness of the Campaign limitations * * *." (Id.) Rather, the court held that "[e]ffective charitable solicitation depends on economical and efficient means to

communicate one's message to mass audiences." 727 F.2d at 1265. There is but one economical and efficient means for legal defense funds to reach the audience of federal employees: participation in the CFC, the exclusive forum for solicitation of that audience at the workplace. Cf. Black United Fund of New Jersey, Inc. v. Kean, 593 F. Supp. 1567, 1569 (D.N.J. 1984).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1984

DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

against

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR STATE OF NEW YORK *AMICUS CURIAE*

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Interest of *Amicus Curiae*

The State of New York submits this brief *amicus curiae*, in support of Respondents, urging affirmance in order to advance the State's historic interest in enhancing the vitality of the charitable sector, which depends on the full and free exercise of the First Amendment rights at issue in this case.

New York's interest in the well-being of charitable enterprises is strong. It has roots deep in Anglo-American law that, since the time of Elizabethan England, has viewed the success of charitable endeavors as an important and legitimate concern of the State.* This interest is manifest in the broad supervisory powers and extensive regulatory duties granted New York State's Attorney General. In New York, the Attorney General oversees the proper administration of charitable property and takes an active role in *cy pres* proceedings, N.Y. Est. Powers & Trusts Law §§ 8-1.4, 8-1.1 (McKinney 1981). He is involved at critical junctures in the operations of charitable not-for-profit corporations through provisions of state law requiring notice to the Attorney General prior to court approval of incorporations, dissolutions, mergers, and transfers of property. N.Y. Not-for-Profit Corp. Law §§ 404(a), 511(b), 907(b) and 1003(b)(2) (McKinney 1970 and Supp. 1983-84). The Attorney General has the power to sue to remedy mismanagement and malfeasance on the part of directors and officers of charitable corporations. N.Y. Not-for-Profit

* *See* Scott, 3 *The Law of Trusts* 3002-04 (3d Ed. 1967); Harvey, The Public-Spirited Defendant and Others: Liability of Directors and Officers of Not-for-Profit Corporations, 17 *John Marshall L. Rev.* 665, 696 (1984); Abrams, Regulating Charity—The State's Role, 35 *The Record of the Association of the Bar of the City of New York* 481, 482 (1980).

Corp. Law §§ 112, 720 (McKinney 1970 and Supp. 1983-84). Additionally, the Attorney General enforces laws governing charitable solicitations, in conjunction with the Secretary of State, whose Office of Charities Registration oversees the activities of public charities through registration and reporting requirements. N.Y. Exec. Law § 175 (McKinney 1982).

New York's experiences protecting the public's interest in the voluntary sector have shown that the charitable sector has historically been characterized by vigorous, often competing voices trying to convince the public that their charitable cause is worthwhile and deserving of public support. The vitality of the philanthropic community, we are convinced, depends on the free exchange of ideas, subject of course to necessary strictures against fraud and misrepresentation.

In addition to this general interest in a diverse and financially sound philanthropic sector, New York State has an interest in encouraging charities to raise funds effectively, which inevitably depends on the widespread communication of ideas. To further this interest, and to help in keeping the cost of raising charitable dollars low, the State Attorney General's Office monitors fund-raising practices and when necessary brings suit to enjoin fraudulent fund-raising practices.* Thus, New York has an interest in facilitating charitable solicitations in the workplace, because experience shows that such solicitations are effective

* *See. e.g., State of New York* v. *State of New York District Attorney Investigators Police Benevolent Association,* No. 41672/83, slip op. (Sup. Ct. N.Y. Co. July 5, 1984); *State of New York* v. *Metropolitan Police Conference of New York State,* No. 41616/82, slip op. (Sup. Ct. N.Y. Co. Feb. 8, 1983); *State* v. *Francis,* 95 Misc. 2d 381 (Sup. Ct. N.Y. Co. 1978).

means of communicating information and raising money for causes that often benefit New Yorkers. New York also has a proper concern with protecting the exercise of First Amendment rights by those interested in charitable institutions because such rights are necessary for successful campaigns among government workers.

Statement

New York adopts Respondents' statement of the case.

Summary of Argument

The United States Government has placed severe restrictions on the First Amendment rights of a small group of charities, known as legal defense funds, by excluding them from the Combined Federal Campaign ("CFC"). CFC is the sole vehicle for soliciting federal employees in the workplace.

Restrictions on the right to exercise First Amendment freedoms on government property are governed by the three-tier test described by this Court in *Perry Education Association* v. *Perry Local Educators' Association,* 460 U.S. 37 (1983). According to *Perry,* government regulation of speech in public forums and limited public forums must satisfy higher standards than regulations imposed on speech in nonpublic forums, but even restrictions applied to nonpublic government forums must be reasonable. The Government restrictions challenged in this case are not reasonable.

New York can speak with considerable authority to several of the Government's arguments. First, New York

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conducts its own campaign for charitable donations among state employees but does not distinguish between legal defense funds and other charities concerned with health and welfare. New York State has not found such a distinction necessary to operate a successful campaign or to avoid disruption of work. Second, New York's experience, exercising its plenary power protecting charitable interests, makes clear that a campaign such as CFC is a singularly effective means of reaching potential donors. This experience also makes clear that the criteria used to exclude legal defense funds in no way assure, as the Government claims, that money collected by CFC will be applied directly to help people in need. The purported basis for these exclusionary criteria is unsound and the restriction therefore unreasonable.

ARGUMENT

By excluding legal defense funds from the only campaign for charitable dollars permitted in the federal workplace, the Government has placed substantial and unreasonable restrictions on First Amendment rights.

A. The Government May Not Place Unreasonable Restrictions on Charities' Participation in CFC.

The Government has excluded legal defense funds, a small number of the many charities that address problems of human health and welfare, from the only charitable funds drive allowed in the federal workplace. This limitation raises substantial First Amendment problems and compels the Government to justify its actions. The Government, however, has not met and cannot meet its burden of demonstrating the reasonableness of the exclusion.

This Court has placed charitable solicitations squarely under the protection of the First Amendment. Recognizing that solicitation is inevitably dependent on speech, this Court has said, "[S]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political or social issues. . . ." *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). In *Village of Schaumburg*, the Court struck down government-imposed rules that restricted charitable solicitations, on the ground that such restrictions violated the First Amendment. Last Term, the Court again considered the nature of free speech rights inherent in solicitations for charities, again struck down government rules that impinged solicitations, and affirmed that speech and charitable solicitations are indeed "intertwined." *Secretary of State* v. *Munson*, —— U.S. ——, 104 S. Ct. 2839 (1984).

When solicitations take place on government property, restrictions on the exercise of these First Amendment freedoms are governed by the standards set forth in *Perry Educational Association* v. *Perry Local Educators' Association*, 460 U.S. 37 (1983). This Court determined that all regulations of speech on public property, at the very least, must be "reasonable" even when a nonpublic forum is at issue. A higher standard, allowing only time, place and manner to be regulated unless a compelling state interest justifies further restriction which is narrowly drawn to achieve its particular aim, applies to public forums and limited public forums. This higher standard, we submit, must apply to charitable solicitations in a public setting among government employees. Clearly the restrictions at issue in this case cannot survive such exacting scrutiny.

However, judged even by the less stringent standard applied to nonpublic forums, the Government's exclusion of legal defense funds cannot pass constitutional muster. "The touchstone for evaluating" distinctions made among potential speakers in a nonpublic forum is "whether they are reasonable in light of the purpose which the forum at issue serves." 460 U.S. at 49. Thus, a proffered justification for a distinction that excludes groups from a nonpublic forum must relate to the nature of the forum itself, and the reasonableness of a distinction is judged not by whether it is reasonable in the abstract but by whether it is reasonable as applied to a particular forum.

The Government has presented a multitude of arguments for the exclusion of legal defense funds from CFC and in defense of the reasonableness of its regulation of Respondents' speech, many of which bear no relationship to the nature of either CFC or the federal workplace. This brief discusses the weaknesses of only four of these various justifications. However, as Respondents' Brief amply demonstrates, none of the other arguments advanced by the Government withstands analysis.

B. New York State, Which Conducts Its Own Campaign for Charitable Dollars in the Workplace, Finds no Support in Its Own Experiences for the Government's Claim that the Exclusion of Legal Defense Funds Is Reasonable.

New York State conducts a campaign among state employees for charitable contributions which is very similar to CFC. However, in New York's campaign, no distinction has been made between "traditional" health and welfare

organizations and other charities. It is this purported distinction on which the Government bases its exclusion of legal defense funds from CFC.

The experiences of New York State's campaign effectively refute two key arguments the Government uses to justify the reasonableness and therefore the constitutionality of its exclusion. It claims its distinction between "traditional" charities and others is reasonable because it is so widely made and commonly accepted, and because the participation of legal defense funds threatens the success of the campaign and disrupts government work. New York State, however, has conducted its campaign without excluding legal defense funds, and this has not damaged the campaign or disrupted the work of running the State. The Government's purported distinction is in reality little more than a ruse.

1. *The Distinction the Government Makes Between "Traditional" Charities and Others Is Neither Common nor Obvious.*

In the CFC eligibility criteria, the distinction is made between what the Government repeatedly calls "traditional" health and welfare organizations that "render services directly to the needy or the sick" and all other charitable organizations. Petitioner's Brief ("Pet. Br.") at 32. This distinction cannot be found in the Executive Order limiting eligibility, which instead relies on an explicit and lengthy exclusion of charities that use litigation to influence public policy, Exec. Order No. 12,404, 3 CFR § 151(1)(b). Nonetheless, the Government asserts, the distinction is generally if not universally understood, "not at all illogical or difficult to grasp," even "natural." Pet. Br.

at 31. Acceptance of this distinction, the Government claims, is long-standing. Pet. Br. at 32. Yet this distinction is neither as common nor as obvious as the Government would lead this Court to believe.

New York State, for one, has never distinguished "traditional" charities from others. New York's statute authorizing payroll deductions for charity drives permits deductions on behalf of organizations with "health, welfare, and recreational purposes." N.Y. State Fin. Law § 201(1) (McKinney 1974). The only limitation contained in the implementing regulations is that participating organizations be "voluntary non-profit charitable organizations rendering services in aid of human health, welfare, and recreation." NYCRR § 335.1. No mention is made of "traditional" charities, causes or organizations; covered organizations are not required to provide direct services. New York law simply defines a broad range of organizations that may participate in a campaign and therefore benefit from access to government employees in their place of work. This definition is expansive enough to include groups excluded from CFC, such as Respondents, some of whom do participate in New York's campaign. *See* Section A2 *infra*. *See also* materials from Erie County and New York City's SEFA campaigns, attached as Exhibits A and B. The Government's implied assertion that New York does make this distinction between "traditional" charities and other charities and does exclude groups like Respondents is simply mistaken.*

* The Government asserts that "most state and local governments" make this distinction and cites a New York case. However, the cited case, *International Service Agencies* v. *United Way of*

(footnote continued on next page)

The two non-New York cases the Government cites for the proposition that "most state and local governments" make the distinction between "traditional" charities and others do not support its claim that the distinction is common, even among government entities. In *Black United Fund of New Jersey, Inc.* v. *Kean*, 593 F. Supp. 1567 (D.N.J. 1984), the district court heard a challenge to a state statute that limited charitable campaigns among state workers to three named charities, not to some more vaguely described group of "traditional" charities. In fact, the court struck down the New Jersey statute as unconstitutional. The Charlotte, North Carolina practice, mentioned only in passing in *City of Charlotte* v. *Local 660, International Ass'n of Firefighters*, 426 U.S. 283, 287 n. 3 (1976), a case about payroll deductions for union dues, did not even address the question of eligibility to a charitable campaign but simply described the city's policy, which, like the New Jersey statute found unconstitutional, permitted payroll deductions to a named charity, not "traditional" charities.

If the purported Government distinction is indeed a clear, historic one, one wonders why the Government never attempted to rely upon it in its regulations. In its previous attempts to exclude legal defense funds, the Government wrote eligibility criteria that were declared unconstitutionally vague. *NAACP Legal Defense and Education Fund* v. *Campbell*, 504 F. Supp. 1365 (D.D.C. 1981). The Government now has attempted a long description of eligi-

New York State, 108 Misc. 2d 305 (Sup. Ct. Albany Co. 1981), does not address the distinction at all. In *International Service Agencies* v. *United Way of New York State*, the court simply ruled that New York's antitrust law does not reach charitable organizations.

bility that only succeeds in drawing a line that keeps Respondents out of CFC by explicitly excluding litigation groups. *See* Exec. Order, 3 CFR § 151(1)(b). Furthermore, the Government itself has had difficulty in applying the distinction it argues is intuitively obvious. It admits that it may have made a "misapplication of the criterion" by admitting the United States Olympic Committee to CFC. Pet. Br. at 49. Thus, the Government's own difficulties in defining and applying this distinction between "traditional" charities and others effectively argues against the claim that the distinction is eminently plain and therefore reasonable.

2. *The State of New York Has Included Diverse Groups in Its Workplace Campaign, Including Legal Defense Funds, Without Damage to the Campaign or Disruption of Work.*

The Government claims that excluding legal defense funds is necessary to avoid disruptions of work and to maintain a consensus on participation that assures the success of the campaign. Neither of these claims finds support in the record.* Significantly, New York State, in conducting a charitable drive among government workers that is very similar to CFC, has found no need to impose the restrictions the Government claims are essential. It has included legal defense funds among the diverse groups that solicit state employees without encountering the difficulties the Government claims attend their participation.

* The Court of Appeals found no evidence in the record "to support the suggestion that work was disrupted when LDF's participated in CFC. . . ." Pet. App. at 32a n. 16. Revenues from CFC continued to grow. *See* Respondents' Brief, Section E(1)(a), showing the increases in CFC income.

New York State's combined campaign for charitable contributions operates in much the same way CFC does. Like CFC, New York's State Employees Federated Appeal ("SEFA") allows solicitations for charities in the government offices during a single combined campaign and during one period of the year.* Like CFC, SEFA relies on government employees working on government time and uses payroll deduction mechanisms to keep the costs of the campaign low. And, like CFC, SEFA permits government workers to designate organizations to receive their donations from a list of approved agencies. The history of the two campaigns is also similar. SEFA and CFC both began about two decades ago and, in recent years, the number and type of participating agencies have grown for both, first to include the National Health Agencies and International Service Agencies and later to include a myriad of other charities.**

Unlike the federal government, however, the State of New York has found no need to limit participation in its charitable campaign. Instead, by consciously promoting pluralism, New York has succeeded in creating a charitable campaign that welcomes diverse groups.

The number and types of organizations participating in SEFA is impressive. In Erie County, for example, over one hundred agencies now take part in SEFA, including the Black United Fund of New York, the Salvation Army, the

* New York's SEFA campaign is governed by N.Y. Fin. Law § 201 (McKinney 1974) and NYCRR Part 335. CFC's operations are described in Respondents' Statement of the Case.

** For a fuller history of the SEFA program, *see, i.e.*, Memorandum to the Governor from the Attorney General on Assembly Int. 4288, Pr. 5580, March 20, 1964.

Ireland Fund, the Jewish Federation of Greater Buffalo, Planned Parenthood-World Population, and the United States Committee for UNICEF.* In New York City, the number approaches five hundred, and the participants include Bronx Legal Services, African Medical and Research Foundation, Black Women's Development Collective, Unitarian Universalist Service Committee, St. Patrick's Home for the Aged and Infirm, Jewish Guild for the Blind, and the Committee for Abortion Rights and Against Sterilization Abuse.**

The legal defense funds excluded from CFC because, the Government claims, they threaten the consensus that makes the campaign work can and do participate in SEFA. Two of the Respondents in this case, the NAACP Legal Defense and Education Fund, Inc. and the Puerto Rican Legal Defense and Education Fund, Inc., solicit through SEFA, as do groups such as the Native American Rights Fund and Community Action for Legal Services. Their participation has created neither difficulty nor controversy. Not surprisingly, the work of New York's government has not been disturbed by the inclusion of legal defense funds. This belies the Government's fanciful claim that such groups' participation inevitably arouses disruptive disputes and controversy. They have solicited through SEFA without public incident or protest, and the SEFA campaigns have continued to run smoothly.

SEFA has remained undisturbed by the increase in the number and diversity of participating charities and continues to prosper. Revenues have increased during these

* *See* Exhibit A.

** *See* Exhibit B.

years of growth, and the 1983 SEFA campaign raised over $1,700,000 from payroll deductions.* In New York City, in 1983, the first year Respondent legal defense funds participated in SEFA, payroll deductions increased by 45.8% over the previous year. The overall increase for SEFA in 1983, which saw considerable growth in the kinds of organizations participating, was 19.3%.

These experiences of New York State demonstrate that charities can successfully solicit government workers without the restrictions on First Amendment freedoms that the Government defends as essential to assure the future of this kind of campaign.

C. New York State, Which has Developed Specialized Knowledge About the Workings of the Not-for-Profit World Through Its Role Protecting Charitable Interests, Finds No Support for the Government's Claim that Its Restrictions on the First Amendment Rights of Charities are Reasonable.

The Government argues that the exclusion of legal defense funds from CFC is reasonable because 1) legal defense funds are free to solicit funds by other means and 2) the benefits created by gifts to the included charities are certain, whereas the benefits created by gifts to excluded charities are not. Both of these arguments ignore the realities of how charitable organizations raise funds.

* The figures on revenues from SEFA were supplied by the Office of Audit and Control, State of New York.

1. *Charitable Solicitations in the Workplace Are A Particularly Effective Method for Communicating A Message to Employees.*

Workplace solicitation is an extremely efficient way to collect donations from individuals. This kind of campaign is largely run by volunteers from the government or corporate workforce and payroll departments. Potential donors are assembled in one place and can be easily addressed as a group. There is a camaraderie of soliciting and giving that is often infectious (witness, *e.g.*, the "thermometer" of contributions prominently displayed). Constant reminders are posted prominently. Payroll deductions make giving relatively painless by spreading the donations over time and eliminating even the minor nuisance (often forgotten) of having to write a check.

New York's experience confirms the efficacy of workplace fund-raising. In New York, all charities that solicit funds from the public must register with the Secretary of State and file annual financial reports. N.Y. Exec. Law §§ 171, 172(b) (McKinney 1982). These reports give detailed information on fund-raising expenses and show the comparable cost of various means of fund-raising. A review of these reports shows that charities that rely heavily on workplace solicitations are able to keep their fund-raising costs low. United Way affiliates are the best example. United Way of New York City, for example, received in public support over $43,000,000 in 1984; 99% of these funds came from federated appeals and only 6% of these receipts went to fund-raising expenses. United Way of Greater Rochester, which raised over $22,000,000 from the public in 1984, derived 97% of this income from workplace solicitations and its fund-raising costs were 7% of this income.*

Charities that are forced to use other methods of fund-raising must devote considerably more of their income to fund-raising and thus have proportionately less to support their programs. The March of Dimes Birth Defect Foundation, for example, which relies primarily on a combination of direct mail, door-to-door solicitations, and special events, spent 24% of its income from public support on fund-raising in 1983. The Muscular Dystrophy Association, which uses the same methods as the March of Dimes as well as telethons and coin containers, spent 20% of income from public support on fund-raising in 1983. And the American Kidney Fund, which raised 85% of its receipts through direct mail in 1983, had to apply 29% of its income from public support to fund-raising.**

The Government minimizes the importance of workplace solicitation of potential donors, although it concedes that CFC is "more convenient and less costly" than other methods of fund-raising. Pet. Br. at 44. In the world of charitable fund-raising, however, convenience and cost are critical. If the cost of communication is too high and the means too difficult, charities are foreclosed from presenting their message and perhaps from continuing to survive, for

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* Financial Reports of the United Way of New York City for the fiscal year ending 6/30/84 and the United Way of Greater Rochester for the fiscal year ending 3/31/84, filed with the Secretary of State of the State of New York.

** Financial Reports of the March of Dimes Birth Defect Foundation for the fiscal year ending 6/30/83, the Muscular Dystrophy Association, Inc. for the fiscal year ending 12/31/83, and the American Kidney Fund, Inc. for the fiscal year ending 12/31/83, filed with the Secretary of State of the State of New York.

they are directly dependent for their success on convincing the public their cause is worthy.

The Government, in denying the efficacy of CFC as a means of communication, further claims that because CFC permits only a thirty-word description of each charity's work the harm to First Amendment rights from the exclusion of any group is constitutionally insignificant. Pet. Br. at 26-27. Comparably, a thirty-second television advertisement is limited in the amount of information it imparts by contrast, say, with a scholarly analysis in a professional journal. However, although the form of the communication may have inherent limits, experience shows that its efficiency in reaching an audience more than makes up for the limitations. The brief message included in CFC literature is an unusually potent form of communication—in some instances, the charitable group's only opportunity to communicate with many in the audience. For that reason, the First Amendment concerns here are significant.

2. *The "Traditional" Charities the Government Has Allowed to Participate in CFC Are Not Different from the Excluded Charities by the Degree of Certainty With Which Money Donated Benefits Individuals.*

Contrary to the Government's assertion, money donated to charities that it labels "traditional" and thus permits to solicit through CFC does not necessarily find its way to programs that aid individuals with any greater certainty than money donated to other groups, such as legal defense funds. For many reasons, a dollar donated to a "traditional" health and welfare organization may not reach individuals in need, whereas money donated to legal defense funds may produce important benefits for large numbers of people.

First, a gift to a charitable organization may not reach the intended beneficiaries because it may be absorbed in administration and fund-raising expenses. The costs of administration, such as salaries, rent, telephone, travel and professional fees, account for a sizable portion of the total expenses of even well-managed, well-established charities. Reports filed with the New York Secretary of State provide some idea of the amounts devoted to administration costs by charities, including charities admitted to CFC. Thus, American Cancer Society, cited by the Government as a typical "traditional" charity serving the sick and the needy, Pet. Br. at 35, reported in the latest report filed with the Secretary of State that 7% of its total expenses were for administrative expenses.* This included over two million dollars in salaries for management personnel (excluding program staff) and over half a million dollars in accounting fees. In addition to these administration costs, charities must also finance fund-raising, which often accounts for an even larger portion of yearly expenses. *See* Section B 1, *infra*. When charities are not managed effectively and scrupulously, the amounts spent on administration and fund-raising may be so high that virtually no money is spent advancing a charity's stated purposes, no matter how beneficent those purposes are.**

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* Financial Report of the American Cancer Society for the fiscal year ending 8/31/83, filed with the Secretary of State of the State of New York.

* Compilations of figures from reports filed with the New York Secretary of State's Office of Charities Registration show scores of organizations soliciting funds for charity from the public devoting less

(footnote continued on next page)

Second, money donated to some of the charities that the Government includes in its category of "traditional" health and welfare organizations may produce no immediate, tangible benefits simply because the charity's work entails risk-taking which may or may not produce useful results. Organizations that sponsor research into cures and therapies for dread diseases are a prime example of charities that may, for valid reasons, fail to produce tangible results. Some research organizations, such as the March of Dimes, have made tremendous breakthroughs that help large numbers of people; others struggle for years with difficult and intractable problems and show little evident progress in reaching concrete solutions. Despite these risks, the Government includes groups that devote their resources to medical research within the classification of "traditional" charities and permits them to solicit through CFC.

By contrast, money given to legal defense funds to litigate specific issues may well improve the lives of many, often rapidly and dramatically. As the Court of Appeals acknowledged, the work of Respondents, through the litigation they have brought, has materially assisted a vast number of people, primarily low-income blacks. Pet. App. at 25a. Of course, some legal cases may end in defeat for plaintiffs, just as some medical experiments may fail, but where there is success the results can often reach a much wider class of people and be felt for a longer period of time (either through an injunction or a money judgment for a class or, less directly, through the establishment of legal

than 10% of their yearly budgets to program expenses. Among these are a substantial number of organizations the Government would label "traditional" health and welfare charities, including organizations purportedly helping the disabled, fighting various physical disorders, and assisting hospitals and old age homes.

precedent) than is possible by distributing money or aid directly to the needy on what is often a one-time basis.

Thus, the distinction the Government attempts to make between gifts to established charities that will "certainly aid the needy," Pet. Br. at 36, and those to legal defense funds where the public benefit is conjectural simply dissolves on close analysis. It is merely an unsubstantiated, *post hoc* rationalization for the Government's claim that its arbitrary exclusion of legal defense funds is reasonable and therefore constitutional.

Conclusion

For all these reasons, the State of New York, as *amicus curiae,* urges this Court to affirm the ruling of the Court of Appeals for the District of Columbia Circuit, holding that the Government must permit legal defense funds to participate in the Combined Federal Campaign.

Dated: New York, New York
January 21, 1985

Respectfully submitted,

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EXHIBITS

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

EXHIBIT A

SEFA

STATE EMPLOYEES
FEDERATED APPEAL
OF
ERIE COUNTY
742 DELAWARE AVENUE
BUFFALO, NEW YORK
887-2645

-1

AGENCY DIRECTORY 1984-85

LISTS MORE THAN 100 HUMAN HEALTH AND WELFARE AGENCIES BENEFITING FROM YOUR SEFA CONTRIBUTION, AND FROM WHICH, YOU CAN OBTAIN ASSISTANCE.

WHAT IS THE STATE EMPLOYEES FEDERATE APPEAL

The SEFA campaign is for employees of New York State only. It brings together 75 United Way agencies, 20 National Health Agencies, and 18 International Service Agencies into a single, once-a-year fundraising campaign.

The SEFA will be the only time State employees will be asked to give at the worksite during the entire year. SEFA gives each employee the opportunity to support more than 100 human health and welfare agencies with a single annual pledge — easily paid by payroll deduction.

WHY PAYROLL DEDUCTIONS?

Paying your pledge in weekly or biweekly installments through the SEFA payroll deduction plan allows you to be more generous than may be possible if you had to give a one-time cash gift. Your payroll deduction pledge will continue only during the 12 month period beginning January 1, 1985, and will automatically terminate in the event you are laid off or change jobs. You may cancel your pledge at any time during the year by notifying your payroll department in writing.

DISTRIBUTION OF FUNDS

Designations are encouraged to reflect the wishes of the employees making contributions. A gift of undesignated funds will, to a great extent, be shared among local service agencies.

UNITED WAY OF BUFFALO AND ERIE COUNTY

Supports Erie County's largest network of human health and welfare agencies, and provides the mechanism for social planning, priority setting, and budgeting of these community services. Seventy-five separate agencies give direct help to one in every three Erie Countians every year. Included in nearly 200 assistance programs are alcoholism and drug counseling, help for battered children and spouses, help with energy costs, family counseling, blood programs, special health programs, emergency relief, physically and mentally handicapped programs, programs for the elderly, etc. United Way contributions are allocated to **local** community agencies by volunteers after carfully studying the service needs of the entire community. United Way campaign costs amount to only 9 cents of every dollar contributed, while 91 cents goes directly to providing services accessible to everyone right here in our home town.

NATIONAL HEALTH AGENCIES

Twenty health-related agencies, each providing one or more of the following services to different segments of the community: Community Services; Public Health Education; Professional Education and Research.

INTERNATIONAL SERVICE AGENCIES

Helps 38 million people overseas with American know how, food, medicine, education and tools for long range self-help development programs and emergency survival needs.

YOUTH & RECREATION SERVICES

CODE

101 **BOY SCOUTS OF AMERICA, GREATER NIAGARA FRONTIER COUNCIL** — 334 Delaware Ave. (02), 853-8815. Distinctive program of character development, citizenship training, physical fitness and moral education. Enlists and trains volunteers in administration and programs. Promotes scouting in all areas of the Council.

102 **BOYS CLUBS OF ERIE COUNTY** — Administrative Office, 742 Delaware Ave (09), 887-2632. A consolidation of the 7 Boys Clubs in Erie County serving youth ages 7-18. Building programs offered in physical education, arts and crafts, woodworking, ceramics, photography, special interest groups, individual and group counseling. Summer camping experience.
BOYS CLUBS OF BUFFALO — Administrative Office, 282 Babcock Street (10), 823-8190.
Babcock Boys Club — 282 Babcock Street (10), 822-0034
Bailey/Doat Boys Club — 2061 Bailey Avenue (11), 892-5864
Butler-Mitchell Boys Club — 370 Massachusetts Street (13), 884-4964
John F. Beecher Boys Club — 180 Tenth Street (01), 852-0188
Masten Boys Club — 397 Northland Avenue (08), 882-2716
BOYS CLUB OF EAST AURORA — 16 Paine Street, East Aurora 14052, 652-4180
Girls Division — Gleed Avenue 14052, 652-1610
BOYS CLUB OF ELMA, MARILLA, WALES — PO Box 5, Elma 14059, 652-9292
Elma Unit — Iroquois Central School, Elma, 652-9292
Marialla Unit — Iroquois Central School, Marilla, 652-7401
Wales Extension — Iroquois Central School, Wales, 652-2260
BOYS CLUB OF HOLLAND — 51 South Main Street, Holland 14080, 537-9370
BOYS & GIRLS CLUB OF ORCHARD PARK — 25 South Lincoln Avenue, Orchard Park 14127, 662-1941
DEPEW-LANCASTER BOYS CLUB — Administrative Office, 5440 Broadway, Lancaster 14086, 683-6755
George R. Crego Unit — 60 Preston Street, Depew 14043, 683-5266
Earle M. Scott Unit — 5440 Broadway, Lancaster 14086, 683-1485
TOWN BOYS CLUB — 54 Riverdale Avenue, Buffalo 14207, 873-3244
Extension Unit — Shaffer Village Youth Center, 876-3768

103 **CAMP FIRE OF BUFFALO AND ERIE COUNTY** — 200 Statler Bldg. (02) 853-6550. An educational and recreational program under trained volunteer leaders centered around home, outdoors, creative arts, science, business, sports and games, citizenship. Varied camping programs.

104 **COMMUNITY MUSIC SCHOOL OF BUFFALO** — 415 Elmwood Ave. (22) 884-4887. Musical instruction as a tool of emotional and personality development and adjustment.

106 **FRESH AIR MISSION (Cradle Beach)** — 864 Delaware Ave. (09), off-season 668-5808. Summer — Cradle Beach Camp, Angola (14006), 549-0350. Summer camp for children 9 to 14 who have emotional or physical need for special services.

107 GIRL SCOUT COUNCIL OF BUFFALO AND ERIE COUNTY — Girl Scout Service Center, 70 Jewett Pky (14), 837-6400. Trained adult volunteer leaders help girls understand, work with, and increase their capacity for serving others through emphasis on the Girl Scout Promise and Laws.

109 YMCA OF BUFFALO AND ERIE COUNTY — 2564 Delaware Ave. (16) 875-1558. Metropolitan Offices. Development of Christian standards of living conduct and life purpose. Promoting the physical, mental and spiritual welfare of persons, emphasizing reverence for God, the brotherhood of man responsibility for the common good, respect for personality and the application of the Golden Rule. Services and programs for men, women, girls and boys of all ages.
DELAWARE FAMILY BRANCH—2564 Delaware Ave., (16) 875-1283
HUMBOLDT FAMILY BRANCH—347 East Ferry St., (08), 833-9622
KEN-TON FAMILY BRANCH—535 Belmont Ave., (23), 874-5051
NORTHEAST FAMILY BRANCH-YWCA—4433 Main St., (26), 839-2543
AMHERST YOUTH CENTER—154 N. Ellicott Creek Rd. (14150), 691-8886
WILLIAMSVILLE YOUTH CENTER—72 S. Cayuga Rd., (21), 634-7359
SOUTHTOWNS FAMILY BRANCH-YMCA-S—3636 Eggert Rd., (14127) 662-9369
WONA CAMPS—RD #1, Gainesville (14066), 855-2964
WILLIAM-EMSLIE BRANCH—585 William St., (06) (Call Main Branch for phone number)

110 YWCA — 190 Franklin St. (02), 852-6120. Offers club and group programs health, physical education and recreation, crafts, conferences, camping, residence. Direct service to individuals, including cooperation with other agencies, action on public issues.
Metropolitan Offices - 190 Franklin St. (02), 852-6120
Central Branch — 190 Franklin St. (02), 852-6120
North Area Branch — 2844 Delaware Ave. (17), 875-3111
South Area Branch — 22 Mesmer St. (20), 822-1808
YWCA Residence — 245 North St. (01), 884-4761
Camp Beaver Hollow — Camp & Year-round Conference Center, 852-6120

SEFA
STATE EMPLOYEES
FEDERATED APPEAL
OF ERIE COUNTY
742 DELAWARE AVENUE
BUFFALO, NEW YORK 14209

HEALTH & HANDICAPPED SERVICES

CODE

301 **AMERICAN CANCER SOCIETY, NEW YORK STATE DIVISION** — 101 John James Audubon Parkway (28), 689-6981. The American Cancer Society works in the areas of research, education and service to cancer patients. Financial aid is available to assist patients.

111 **AMERICAN DIABETES ASSOCIATION** — 240 Statler Building (02), 847-0200. The American Diabetes Association believes the most effective way of dealing with diabetes is to advance its four programs of (1) Research, (2) Patient Education, (3) Professional Education, and (4) Public Information and Diabetes detection.

302 **AMERICAN HEART ASSOCIATION, WESTERN NEW YORK CHAPTER** — Statler Hotel, 164 Franklin Street (02), 853-5356. A voluntary agency to reduce premature death and disability from cardiovascular disease through research, public and professional education and community service.

303 **AMERICAN KIDNEY FUND** — 169 Tampa Avenue, Albany (12208), (518) 438-0456. Provides direct financial assistance to needy kidney patients, establishes emergency funds in dialysis centers, provides public education materials and community services, facilitates organ donation.

304 **AMERICAN LUNG ASSOCIATION** — 766 Ellicott Street (03), 886-4655. Fights asthma, emphysema, bronchitis and lung cancer. It keeps lungs healthy through research and prevention programs including "Freedom from Smoking."

112 **AMERICAN SOCIAL HEALTH ASSOCIATION** — Eastern Region, 425 Starin Ave. (16), 716-832-0124. The only National voluntary Health Agency dedicated to the prevention, control and eventual elimination of sexually transmitted disease as a social problem. Through programs of research (including the search for vaccines), information and education, policy development and implementation, the association provides materials, technical assistance and opportunities for involvement by concerned citizens, organizations and institutions. National VD Hotline - 800-227-8922. HELP (herpes Information Program).

113 **ARTHRITIS FOUNDATION, WNY CHAPTER** — 4556 Bailey Ave. (26), 837-8600. Health agency concerned with arthritis and related disorders. Supports research to learn the causes and develop a preventive or cure for arthritis and provides fellowships. Provides Patient Services to arthritis victims and their families, and makes referrals to arthritis specialists and clinics. Public information about arthritis and efforts of the Foundation. Educational Seminars for physicians and allied health professionals on latest developments in arthritis. Sponsors patient education classes at which arthritis victims can get a more thorough understanding of arthritis, and arthritis group clubs.

305 **ASSOCIATION FOR CRIPPLED CHILDREN AND ADULTS OF NEW YORK STATE, INC. (EASTER SEALS)** — 331 Alberta Dr. . :6). 835-4686. Offers vital year-round assistance to people with physical disabilities. Programs include scoliosis counseling, camping, recreation and public education.

115 **BLIND ASSOCIATION OF WNY** — 1170 Main St. (09), 882-1025. Information and technical assistance to blind persons. Orientation, Mobility and Rehabilitation programs provided through on-the-job training, sheltered employment, recreation program. Social Service other than relief.

115 **BUFFALO AREA COUNCIL ON ALCOHOLISM, INC.** — 245 Elmwood Avenue (22). 885-0095. Promotes understanding of Alcoholism through conferences, radio, TV, press, lecture and discussion programs, educational services, information and referral services to problem drinkers and their families.

116 **CEREBRAL PALSY ASSOCIATION OF WNY, UNITED** — 7 Community Drive (25). 894-0130. Operates a comprehensive pre-school center and day care programs for the severely involved. An extension adult recreational program and work activities program is offered.

117 **CHILD AND ADOLESCENT PSYCHIATRIC CLINIC, INC.** — 3350 Main St. (14). 835-4011. Non-sectarian. Diagnosis and treatment of emotional disturbances of children and parents. Participates in community mental health programs. Affiliated -- State University of New York at Buffalo.

312 **CITY OF HOPE/CANCER & MAJOR DISEASES CENTER** — 674 North Broad Street, Philadelphia, Pennsylvania 19130. City of Hope/Cancer & Major Disease Center provides free, direct personalized care for patients suffering from major catastophic maladies: cancer and leukemia, heart, blood and lung diseases, diabetes and other disorders of heredity and metabolism.

170 **COORDINATED CARE MANAGEMENT CORPORATION** — 560 Delaware Ave., Suite 400 (02). The Coordinated Care Management Corporation (CCMC) was created to demonstrate the effectiveness of integrating and coordinating a community network of care for the elderly and to identify and implement solutions to the problems in the current long term care service system.

311 **CYSTIC FIBROSIS FOUNDATION, WESTERN NEW YORK CHAPTER** — 6363 Transit Road, Depew 14043, 681-1580. Voluntary health agency whose primary purpose is to sponsor research to find a cure or control for cystic fibrosis, the number one genetic killer in children.

118 **EPILEPSY ASSOCIATION OF WNY** — 339 Elmwood Ave. (22). 883-5396. Referral for medical evaluation, social service programs, rehabilitation, work with employers and legislative bodies to end discrimination in the employment field, recreation, public education, research.

119 **HEARING AND SPEECH CENTER, BUFFALO** — 325 Summer St. (22). 885-8318. Information center, routine testing of hearing, information and assistance to families of hard-of-hearing and deaf children, diagnosis, treatment and research of hearing and speech problems.

120 **HEMOPHILIA CENTER OF WESTERN NEW YORK, INC.** — 5th Floor, Erie County Medical Center, 462 Grider Street (15), 896-2470 or 898-3331. Operates a comprehensive multidisciplinary outpatient clinic for patients with coagulation disorders, including diagnostic and management plans, orthopedic, dental, psychological, social evaluation, and vocational and genetic counseling. Coagulation screening and carrier detecting services available upon referral.

121 **HUMAN GROWTH FOUNDATION** — Children's Hospital of Buffalo, 219 Bryant St (22), 878-7645. Sponsors into causes, prevention and cures of human growth abnormalities and lack of proper growth. Collections human pituitary glands for human growth hormones extraction.

122 **LEAGUE FOR THE HANDICAPPED, INC.** — 474 E. Main St., Sprinville, N.Y. 14141, 592-2718. Services to pre-school handicapped children. The program offers educational therapeutic and social experience for mentally retarded, physically handicapped, emotionally disturbed and multiple handicapped children.

306 **LEUKEMIA SOCIETY OF AMERICA, INC., WESTERN NEW YORK CHAPTER** — 3606 Main Street (26), 833-5400. Programs are aimed at finding a cure for the number one disease killer of children today — Leukemia and related diseases.

307 **MARCH OF DIMES BIRTH DEFECTS FOUNDATION, WESTERN NEW YORK CHAPTER** — 4248 Ridge Lea Road, Suite 10 (26), 834-3306. Combats birth defects which strike 250,000 babies annually. Through research, medical and community services and public and professional education, the March of Dimes will overcome these problems of birth defects.

313 **MEDIC ALERT FOUNDATION INTERNATIONAL** — 2323 Colorado Ave., PO Box 1009, Turlock, CA 95381. Medic Alert provides life-protecting emergency medical identification and information (bracelet, necklace, wallet card, 24 hour nationwide, free phone answering service) to assure timely, appropriate emergency treatment information for its members.

123 **MENTAL HEALTH ASSN. OF ERIE COUNTY** — 1237 Delaware Ave. (09), 886-1242. Volunteers, supported by trained staff, provide 24-hour information service. Promotes better mental health laws, regulations and services. Stresses coordination of government and voluntary agencies.

124 **MULTIPLE SCLEROSIS ASSOCIATION OF WNY (UW)** — 704 Brisbane Bldg (03), 854-0638. Medical services, clinical services at Buffalo General Hospital, research into causes, prevention, cure and alleviation of Multiple Sclerosis, social service, physical therapy, recreation, public education.

308 **MUSCULAR DYSTROPHY ASSOCIATION, INC.** — 3960 Harlem Road, Suite #6 (26), 839-5750. Provides clinic visits, orthopedic equipment, transportation, physical therapy, occupational therapy and recreational activities, including camp for persons with muscular dystrophy or related neuromuscular disease, including ALS.

314 **NATIONAL ASSOCIATION FOR SICKLE CELL DISEASE, INC.** — New York State Office, 380 Garnsey Road, Pittsford, N.Y. 14534. The National Association for Sickle Cell Disease, Inc. (NASCD) is a voluntary non-profit organization which provides delivery of care to the needy, indigent, ill or infirm, and persons in need of preventive health care. The NASCD also provides education and training of personnel for the delivery of health care, conducts research activities, and provides information and counseling with respect to the obtaining of any of the foregoing services and conducts programs to lessen the burdens of government with respect to the provisions of any of the foregoing services.

315 **NATIONAL HUNTINGTON'S DISEASE ASSOCIATION, INC.** — 1182 Broadway, Suite #402, New York, N.Y. 10001. The National Huntington's Diseases Association is a voluntary health organization providing support and services to Huntington's Disease patients and their families. The focus of NHDA is the support of research into causes, prevention and cure of HD. In addition, the Association maintains a team of social workers who operate hot lines, provide emergency counseling and referrals, and lead mutual aid self-help groups.

309 **NATIONAL MULTIPLE SCLEROSIS SOCIETY, WESTERN NEW YORK CHAPTER** — 2060 Sheridan Drive (23), 875-7710. Provides over 1,700 patients with services including equipment loans, counseling, referrals and educational programs, support research into the cause and cure of Multiple Sclerosis.

310 **NATIONAL SOCIETY TO PREVENT BLINDNESS** — 79 Madison Avenue, New York, New York 10016-7896. (1) 212-684-3505. The oldest voluntary health agency nationally engaged in preventing blindness through community service programs, public and professional education, and research.

316 **NEW YORK STATE SOCIETY FOR AUTISTIC CHILDREN** — 275 State Street, Albany, N.Y. 12210. Dedicated to the education and welfare of children and adults with severe disabilities in communication and behavior. Provides information, advocacy, program development, referrals, conferences and family support services, education, training and care relief of severely developmentally disabled persons.

125 **PARENTS OF DIABETIC CHILDREN, INC.** — 3900 South Park Avenue (19), 823-5450. An organization of parents and insulin-dependent diabetics established to improve understanding of the treatment for juvenile diabetes. Serves as a clearinghous for up-to-date information on juvenile diabetes. Provides regular membership meetings, parent-to-parent counseling, and works to enhance various programs involving research on juvenile diabetes.

126 **PSYCHIATRIC CLINIC — JEWISH FAMILY SERVICE** — 775 Main St. (03), 853-9956. Non-sectarian adult, outpatient psychiatric clinic. Individual and group therapy, medicinal therapy; psychiatric consultation. Monday-Friday 9 a.m. to 5 p.m., Tuesday, until 9 p.m.

317 **RESEARCH TO PREVENT BLINDNESS, INC.** — 598 Madison Avenue, New York, New York 10022. Research to Prevent Blindness has provided annual grants in support of eye research amounting to $6,440,000, helping to improve medical eye care and treatment services available to the people of New York. Research to Prevent Blindness is the world's leading organization in support of eye research. Virtually all funds, raised at a cost of less than 2%, are directed to that end — reducing the burdens of government to the extent.

127 **RETARDED CHILDREN, NYS ASSN. FOR, ERIE COUNTY CHAPTER** — 101 Oak Street (03), 856-4201. Admin. Offices and Adult Services, U-Crest Elementary, 1 Nagle Dr., Cheek. 14225. Educational Services. A. Children's Service: 1) Nursery programs for developmentally disabled children from infancy to five years of age. 2) School programs for children with mental retardation from 5 to 21 years of age. 3) Community Planning - Neighborhood services, including Development and implementation of community-based programs for children who are mentally retarded and their families. Home training, Summer Camp. B. Adult Services - Allentown Industries: 1) Vocational assessment and training. 2) Sheltered work situations. 3) Support Services. 4) Transportation. C. Residential Services: Community residences for children and adults. E. Community Education: 1) Information and materials. 2) Library. 3) Speakers' Bureau.

CODE

318 **ST. JUDE CHILDREN'S RESEARCH HOSPITAL** — 505 North Parkway, Memphis Tennessee 38105 St Jude Children's Research Hospital, founded by Danny Thomas, is leading the battle against childhood cancer. Cancer kills more children than any other disease. Research at St. Jude aims at stopping this tragic waste St Jude Hospital is non-sectarian, interracial and cares for all patients who are admitted by physician referral if their disease is under study Because there is no financial test for admission, many of our patients are from economically deprived environments.

128 **SUBURBAN ADULT SERVICES, INC.** — PO Box 526, Route 39, Sardinia, 14134. 496-5551 Comprehensive programming offered to handicapped/disabled adults including evaluation, training, social service support geared to capitalize on individuals' strengths, de-emphasizing weaknesses, in accordance with their maximum potentials

319 **THE FIFTY TWO ASSOCIATION** — 441 Lexington Avenue, New York, New York 10017 The 52 Association is a non-profit organization dedicted for more than three decades to working with the physically handicapped on a rehabilitation through sports and recreation concept. It also conducts in New York State and the surrounding areas, ski clinics for amputee and blind persons at no cost to the participants. All lodging, food, instruction, equipment and lift tickets are provided at no charge to the participants.

320 **TOURETTE SYNDROME ASSOCIATION, INC.** — 41-02 Bell Blvd., Bayside, New York 11001 The Tourette Syndrome Association, Inc. is dedicated to preventing controlling and finding a cure for Tourette Syndrome, a neurological movement disorder Programs include: Education and training of personnel for the delivery of health care, Health research; Education, training, care and relief of handicapped persons; Counseling of persons in need of social adjustment and rehabilitation of the families of such persons. Information and Counseling with respect to obtaining appropriate service

129 **VISITING NURSING ASSOCIATION OF BUFFALO, N.Y., INC.** — 111 Great Arrow Ave (16), 874-5400 Skilled health care for the essentially homebound patient on a part-time intermittent basis, including nursing, homemaker-home health aide service speech therapy, occupational therapy, physical therapy, nutrition home economics and medical social service. Social Service to all ages with emphasis on rehabilitation. Majority of patients are senior citizens, with reimbursement under Medicare.

130 **VOCATIONAL REHABILITATION CENTER, NIAGARA FRONTIER** — 100 Leroy Ave (14), 833-3231 Aids disabled individuals to improve themselves through rehabilitation, research and education, trains personnel for careers in this field Helps the handicapped become completely or partially self-supporting

131 **W.N.Y. ASSOCIATION FOR THE LEARNING DISABLED (WNYALD)** — 742 Delaware Ave (09), 887-2636 A non-profit agency run by parents and professionals, whose purpose is to advance the education and general well-being of the learning disabled child and adult Services and activities for the learning disabled and their parents consist of program meetings, workshops, lectures, therapeutic recreation programs, summer residential camp for learning disabled children, speakers bureau for in-services, talking book program, young adult learning disabled group, legal advocacy, and up-to-date circulating media library of books, films, video tape cassettes, pamphlets, articles, periodicals as well as suggested teaching materials, guides and techniques on learning disabilities.

164 **WESTERN NEW YORK COUNCIL ON OCCUPATIONAL SAFETY AND HEALTH (WNYCOSH)** — 892 Main St. (02) 886-5546. WNYCOSH provides services to employees and employers in the field of occupational safety and health It serves individuals who are sick or injured because of their jobs, and groups to improve workplace safety health.

NEIGHBORHOOD SERVICES

CODE

140 **ADVISORY BOARD OF LOVEJOY ELDERLY AND YOUTH, INC. (ABLEY)** — 1213 Lovejoy Street (06), 895-4074. ABLEY can generally be categorized as a multi-purpose social and housing services agency for Buffalo's Lovejoy and far East Side communities. Our work deals primarily with family support services, particularly as they relate to youth and elderly community social work, educational programs and housing rehabilitation project.

141 **AFRICAN-AMERICAN CULTURAL, INC.** — 350 Masten Ave. (09), 884-2013 Established to instill in our youth, pride in themselves and to encourage self-improvement. Services community through the arts and cultural media dealing with Afro-American heritage.

142 **ALLENTOWN COMMUNITY CENTER** — 111 Elmwood Ave. (01), 885-6400 Formed to develop a central organization and a professional staff capable of molding the highly mixed ethnic and cultural population into a dedicated neighborhood force

143 **BUFFALO FEDERATION OF NEIGHBORHOOD CENTER, INC.** — 97 Lemon Street (04), 856-0363. A multi-purpose agency providing educational, cultural, social, recreational, community, self-development, and health-related programs and services primarily to residents of the Ellicott and Masten Districts through Child Development Programs for 2-13 year olds. Youth and Young Adult Services for 14-24 year olds, and Senior Services for persons 60 years of age and over. Programs and services are offered year-round at the following sites
Neighborhood House Association - 76 Orange Street, 856-0363
Westminster Community House - 421 Monroe Street, 852-5065
Moot Senior Citizen Center - 292 High Street, 856-4637

144 **COMMUNITY ACTION ORGANIZATION OF ERIE COUNTY, INC.** — 70 Harvard Place (09), 882-8118. CAO is designated to advocate for poor and disadvantaged citizens of City of Buffalo and Erie County. It operates and delegates programs that assist the poor to influence community decision-making process, analyze, recommend and coordinate improvements, employ human and financial resources and provide professional services.

145 **COMMUNITY SERVICES DEPARTMENT, COUNCIL OF CHURCHES** — 1272 Delaware Ave. (09), 882-4793. Liaison between social agencies and Protestant and Eastern Orthodox churches. Referral services to social agencies and churches. Social planning with churches, agencies. Research and Planning Council.

146 **COMPASS HOUSE** — 371 Delaware Ave. (02), 886-0935 and 852-8314. Provides temporary emergency housing, food, and crisis, family and phone counseling to runaways and teens ejected by their parents. Individual and daily group counseling.

147 **CONCERNED ECUMENICAL MINISTRY TO THE UPPER WEST SIDE OF BUFFALO (CEM)** — 656 Elmwood Ave. (22), 882-2442. Services to Upper West Side residents through a consortium of 17 West Side churches. Free or minimal-cost programs for children (after-school and summer Lots of Summer Fun programs), teens (chore service and Mayor's Summer Youth jobs and recreational, cultural, and educational programs), and senior citizens.

148 **HOUSING ASSISTANCE CEKTER OF NIAGARA FRONTIER, INC.** — 1233 Main Street (09), 881-2200. Provides housing counseling services and information to low/moderate income residents of Erie-Niagara counties. Mortgage delinquency and default counseling and renter assistance

149 **FRIENDSHIP HOUSE** — 284 Ridge Road, Lackawanna, N.Y. (18), 823-0831 A multi-purpose community organization, senior citizen program — group dining, chore program, neighborhood area agency headstart program — preschool, language enrichment-tutoring, remedial reading, youth program — social, recreation & education, teen program.

150 **INTERNATIONAL INSTITUTE** — 864 Delaware Ave. (09). 883-1900. Individual service and orientation of new arrivals in problems of naturalization, immigration, deportation, promotion of understanding between native and foreign-born people, assimilation into American life.

151 **SOUTH BUFFALO COMMUNITY DEVELOPMENT ASSOCIATION** — 2219 South Park Avenue (20), 822-4532. Agency provides a comprehensive program of human services and related activities to the residents of South Buffalo. Services include senior citizen activities, transportation, information and referral, and recreation services for all ages.

152 **NEIGHBORHOOD INFORMATION CENTER, INC.** — 1081 Broadway (12), 897-4100. Performs outreach work not only in Buffalo's East Side, but responds to any problem, whenever needed. In involvement with human problems, a network with other agencies is formulated. Services include advocacy interpretation in language difficulties, transportation, friendly visits. Follow-ups performed to gradually normalize human life. Emergency center in time of disasters, i.e., fires, ice storms, blizzards

CHILD & FAMILY SERVICES

CODE

132 **CHILD AND FAMILY SERVICE** — 330 Delaware Ave. (02), 842-2750. 5449 Main St. (21), 632-5500. North Regional Office, 3407 Delaware Ave., Kenmore (17), 876-8174. South Regional Office, 585 Ridge Rd., Lackawanna (18), 823-2531 East Regional Office, 5422 Transit Rd., Depew (14043), 683-7435. Under the Economic Opportunity Act "Read-Out" Program. Offices at Commodore Perry Project, Perry Unit, Apt. 1D, 344 Perry St. (04), 849-1530. Ellicott Unit, 690 William St. (06), 849-1540. Masten Unit, 1490 Jefferson Ave. (08) 883-1973. Cold Pring Unit, 209 Northampton St. (08) 886-3192

Child and family services through casework and other skilled services, marriage counseling, specialized home-maker services, foster family care, unmarried parent and adoption service, group home.

133 **CONSUMER CREDIT COUNSELING SERVICE OF BUFFALO, INC.** — 730 Convention Tower, 43 Court St. (02), 854-1710. Trained financial advice, financial counseling and repayment plans with creditors. Consumer Education Programs to groups

134 **LEGAL AID BUREAU** — 310 Walbridge Bldg., 43 Court St (02) 853-9555 Provides legal assistance to those unable to afford private counsel

135 **LIFE AND DEATH TRANSITION CENTER, INC.** — 1237 Delaware Ave (09) 881-5182 Counseling, education, information and resources are offered to anyone concerned about living with life-threatening illness, death and grief Training, including seminars and workshops, is available to human service professionals to help people cope with death and bereavement

136 **LUTHERAN SERVICE SOCIETY OF N.Y.** — 2500 Kensington Ave (26) 839-3391. Welfare Services including casework counseling for unmarried parents; adoptive home recruitment and adoptive placement; social services for families, children, and individuals, institutional care for adults

137 **ST. AUGUSTINE'S CENTER** — 1600 Fillmore Ave. (11), 897-4110 Services for pregnant girls, maternal-infant care clinic, day care, remedial reading, youth counseling, employment training, well child clinic, adult education, legal counseling, Cultural Arts.

138 **SALVATION ARMY, THE** — 960 Main ST. (02), 887-2711 **FAMILY AND PERSONAL SERVICE** — 970 Main St (02), 887-2711 **GOLDEN AGE CENTER** — 950 Main St. **YOUTH CENTER AND GYMNASIUM** — 970 Main St (02), 887-2711. **MEN'S SOCIAL SERVICE CENTER** — 1080 Military Rd (17), 875-2533 **NEIGHBORHOOD CENTERS: CITADEL** — 960 Main St (02) 882-4440. **KENSINGTON** — 21 Westminster Ave (15), 832-2457 **WEST SIDE TEMPLE** — 284 Elmer St (13), 885-1161 Administers to spiritual, moral and physical needs of mankind Programs of guidance, unemployment and emergency relief, solving personal problems of the family and the individual

139 **URBAN LEAGUE, BUFFALO** — 455 William St., Towne Gardens Plaza (04) 854-7625. Economic, educational, social development of minority group people in Buffalo and Erie County; economic development and employment, education, housing and health and welfare

156 **PARENTS ANONYMOUS** — 2939 Bailey Avenue 14215 24-Hour Parents' Telephone Hotline: 892-2172 (office 833-9772) Volunteer group provides crisis and support services to families with difficulties in parent-child relationships A 24-hour daily hotline telephone service is available for crisis situations Based on a self-help model, 200 volunteers are involved in group discussions, outreach projects, child care and community education programs.

153 **NEIGHBORHOOD LEGAL SERVICES, INC.** — Rm. 495 Ellicott Sq., 295 Main St (03), 847-0650 Provides legal counseling and representation to financially eligible persons residing within target areas Branch offices are located 487 Niagara St (01), 853-9570, 281 Ridge Rd., Lacka. (18), 824-7450; offices hours held Monday afternoons Child & Family Services, 344 Perry St., 1D (04)

154 **L. K. PAINTER COMMUNITY CENTER** — PO Box 575, Collins, New York (14034), 532-2006. Services include education, recreation, social community planning, senior citizen program, civic activities, remedial reading and referral services.

171 **PUERTO RICAN AMERICAN COMMUNITY ASSOCIATION, INC.** — 261 Swan Street (04) The Puerto Rican American Association, Inc. was established in 1971 for the purpose of A) To identify chronic social problems of Hispanics in Western New York, B) To develop appropriate service delivery vehicles which will alleviate social problems within the Hispanic community of Western New York, and C) To improve the quality of life for Hispanics through the effective utilization of available resources.

155 **VALLEY COMMUNITY ASSOCIATION** — 208 Elk Street (10). 823-3430 Community organization for community improvement and special emphasis on youth development with varieties of programs in recreation, tutoring, cultural enrichment, athletics and community service.

INTERNATIONAL SERVICE AGENCIES

CODE

200 **INTERNATIONAL SERVICE AGENCIES** help millions of needy people overseas through self-help development programs providing medical care, health education, nutrition, farming, schools, job training, clean water, sanitation, shelter and emergency disaster aid. (800) 638-8079.

201 **CARE** — For 38 years CARE has provided disaster relief. In addition it administers the distribution of food and participates in self-help, agro-forestry, nutrition, health, education and training projects in 35 Third World countries. (ISA) (800) 638-8079.

202 **INTERNATIONAL HUMAN ASSISTANCE PROGRAMS** — Operates rural aid programs in 13 developing countries. Project areas include health care, vocational training, women in development, and farming with an emphasis on strengthening income producing activities. (ISA) (800) 638-8079.

203 **PROJECT HOPE** — Has trained thousands of medical personnel in developing countries so that they may one day care for their countrymen. HOPE activities cover five continents. (ISA) (800) 638-8079.

204 **PLANNED PARENTHOOD-WORLD POPULATION** — Works in over 100 countries supporting family planning services to those who need it most and use it best, with emphasis in Latin America, Africa, Asia. (ISA) (800) 638-8079.

205 **INTERNATIONAL RESCUE COMMITTEE** — The leading American nonsectarian agency providing relief, medical, self-help and resettlement services in overseas camps for refugees and uprooted war victims fleeing from persecution and violence. (ISA) (800) 638-8079.

206 **SAVE THE CHILDREN** — Helps impoverished communities in 37 countries forge a better life for their children through self-help projects to improve health, education, agricultural production and incomes. (ISA) (800) 638-8079.

207 **HELEN KELLER INTERNATIONAL** — Saves the eyes of millions overseas every year. Children get Vitamin A to prevent nutritional blindness and antibiotics to treat blinding trachoma. Adults with cataracts regain sight through surgery. (ISA) (800) 638-8079.

208 **PEARL S. BUCK FOUNDATION** — Educates Americans to the existence of the Amerasian children; educates these American children to be responsible persons in their birth countries through sponsorship program. (ISA) (800) 638-8079.

209 **FOSTER PARENTS PLAN** — Helps needy children and their families in 22 countries achieve better lives through education, health care, income-producing projects, and financial assistance. Family development and self-help are emphasized. (ISA) (800) 638-8079.

210 **AFRICARE** — Helps African people grow more food, develop good water supplies, and improve health. Africare also gives Africa help themselves. (ISA) (800) 638-8079

211 **INTERNATIONAL EYE FOUNDATION** — Works to restore sight to the needlessly blind in disadvantaged areas of the world through its doctors, nurses and volunteers. Last year 450,000 children and adults were served by IEF. (ISA) (800) 638-8079

212 **OXFAM AMERICA** — Is an international nonprofit agency that supports self-help development projects and disaster relief in the poorest countries of Asia, Africa, and Latin America, and also distributes educational materials. (ISA) (800) 638-8079

213 **UNITARIAN UNIVERSALIST SERVICE COMMITTEE** — Builds partnerships with poor communities in the developing world for better health, education, nutrition and full, free lives in Central America, India, the Caribbean and Africa. (ISA) (800) 638-8079

214 **UNITED STATES COMMITTEE FOR UNICEF** — Supports United Nations Children's Fund education programs, plus nutrition, health, and unpolluted water projects in 115 countries utilizing medical breakthroughs with the potential to save 20,000 children's lives daily. (ISA) (800) 638-8079

215 **AFRICAN MEDICAL & RESEARCH FOUNDATION** — Their flying doctors bring needed health care services and training to remote rural villages in East Africa through its air and ground mobile medical teams. (ISA) (800) 638-8079

216 **AMERICAN NEAR EAST REFUGEE AID** — Contributes funding and technical assistance to Palestinian and Lebanese institutions providing health, education, and community services in the West Bank, Gaza Strip, and Lebanon. (ISA) (800) 638-8079

217 **CHURCH WORLD SERVICE/CROP** — A cooperative agency of 31 Protestant and Orthodox communions meeting human needs in 70 countries through programs of social and economic development, disaster/emergency response, and service to refugees. (ISA) (800) 638-8079

218 **IRELAND FUND** — Supports 250 peace, culture and charity projects throughout Ireland, North and South, Protestant and Catholic. It helps children and others affected by the agony of Ireland's unrest. (ISA) (800) 638-8079

MISCELLANEOUS

CODE

801 AMERICAN RED CROSS GREATER BUFFALO REGIONAL CHAPTER — 786 Delaware Ave (09). 886-7500 Administration, Blood Bank, Disaster Preparedness and Relief, Nursing Programs, Loan Closed Nurse Enrollment, Office of Volunteers, Safety Programs, Service to Military Families and Youth Programs

802 BLACK UNITED FUND OF NEW YORK, INC. — 356 Convent Ave., New York, New York 10031 A federated non-profit corporation designed to support projects and programs that address the critical needs in the black communities of New York and to bring about an economic and social revitalization in these communities. The programmatic funding areas are: health and social services, alternative education, social justice and legal services, arts and cultural, economic development and emerging needs

803 JEWISH FEDERATION OF GREATER BUFFALO, INC. — 787 Delaware Ave (09). 886-7750 Four agencies provides families and children's service, care and rehabilitation counseling

804 LITERACY VOLUNTEERS OF BUFFALO AND ERIE COUNTY — 49 Linwood Avenue (09). The purpose of the organization shall be to promote and foster increased literacy in Buffalo and Erie County and contiguous areas through volunteer teaching of and aid to the illiterate and semi-illiterate; to encourage and aid individuals, groups or organizations desiring to increase literacy through voluntary programs, to receive, invest and disburse funds, and to hold property for the purposes of the organization

805 THE JEWISH CENTER OF GREATER BUFFALO, INC. — 787 Delaware Ave., 886-3145 and 2600 N. Forest Rd., 688-4033

806 ROSA COPLON JEWISH HOME & INFIRMARY — 10 Symphony Circle (01). 885-3311

807 UNITED SERVICE ORGANIZATIONS (USO) — 1146 19th St., N.W. Washington, DC 20036. USO is a volunteer civilian organization. Its worldwide services and programs ease the special problems intrinsic to military life for two million military personnel and their three million dependents. Services include intercultural understanding, information and referral, travel assistance, aid for families, informal education, community involvement, recreational activities, orientation to foreign cultures, shows and centers

CAMPAIGN GROUPS

CODE

100 **UNITED WAY OF BUFFALO & ERIE COUNTY** — Provides information and referral service and Voluntary Action Center to all county residents, reviews and evaluates social welfare agency services, and provides research and planning service to social welfare agencies

200 **INTERNATIONAL SERVICE AGENCIES** — Help millions of needy people overseas through self-help development programs providing medical care, health education, nutrition, farming, schools, job training, clean water, sanitation shelter and emergency disaster aid (800) 638-8079

300 **NATIONAL HEALTH AGENCIES** — Includes local and national health agencies providing research and direct patient services in the fight against mental and physical illness

SEFA Statement on Giving

The suggested guide to giving is not intended to tell you how much you MUST give. Rather, it is intended to bring fairness to giving and show you how your one pledge helps one out of every three persons in the Erie County area, people from all walks of life. When determining your pledge, it is important to remember that the SEFA is not one campaign, but over 100 campaigns in ONE.

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

MARIO M. CUOMO
GOVERNOR

The programs and services that meet local needs in our communities depend on contributions generously given through the State Employees Federated Appeal.

The citizens of this State benefit from an outstanding quality of community services because the delivery of these services in New York State is enriched by the contributions, volunteer support, and dedication of public employees. Our help provides urgently needed services at a time when economic problems have put thousands in special need of our attention and assistance.

The State Employees Appeal is composed of volunteers, like yourselves, who decide which organizations and services in their own community should receive their contributions. Now, more than ever, your support is needed.

Please join me in responding generously when a fellow State worker seeks your donation.

June 4, 1984

Mario M. Cuomo

NOTICE

A copy of the last Annual Financial Report filed with the New York State Board of Social Welfare by the State Employees Federated Appeal may be obtained upon request by writing to:

NEW YORK STATE
OFFICE OF CHARITIES REGISTRATION
Albany, N.Y. 12231

For information regarding individual SEFA agency reports, direct your inquiries to the above office, or to the agencies directly, whose names and addresses appear in this brochure.

Need Help? 887-2631

We're the information and referral service of the United Way of Buffalo and Erie County. And we're free. No problem is too big or too small for us to tackle. We have more than a thousand people and organizations waiting to help you help yourself.

Give us a call. Your troubles won't trouble us at all. We'll refer you to the proper human care service agency. Phone 887-2631. Monday through Friday, 8:30 a.m. to 4:30 p.m. for information and referral.

SUGGESTED GUIDE TO GIVING

IF YOUR INCOME IS:	SUGGESTED REGULAR GIFT	SUGESTED LEADERSHIP GIFT
Up to $6.00 hourly or up to $12,000 yearly	$1.50 weekly	$2.25 weekly
$6.01 to $10.00 hourly or $12,001 to $20,000 yearly	$2.35 to $3.85 weekly	$3.50 to $5.75 weekly
$10.01 to $17.50 hourly or $20,0001 to $35,000 yearly	$5.85 to $10.00 weekly or 1.5% annually	$8.50 to $14.85 weekly or 2.2% annually
$35,001 or more yearly	$13.50 weekly Or 2.0% annually	$20.00 or more weekly or 3.0% annually

AGENCY DIRECTORY 1984-85

NEW YORK STATE
OFFICE OF CHARITIES REGISTRATION
Albany, N.Y. 12231

For information regarding individual SEFA agency reports, direct your inquiries to the above office, or to the agencies directly, whose names and addresses appear in this brochure.

EXHIBIT B

"THE FAMILY OF NEW YORK"

NYC STATE EMPLOYEES WORKING TOGETHER HELPING OTHERS IN NEED BY GIVING TO THE NEW YORK CITY STATE EMPLOYEES FEDERATED APPEAL.

NEW YORK CITY
STATE EMPLOYEES FEDERATED APPEAL

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

MARIO M. CUOMO
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Mario M. Cuomo

YOU MAKE IT HAPPEN

You, your family, your relatives and your friends benefit from contributions made to this appeal.

Whether it's a maternity ward for a newborn, a day care center for your children, social justice and legal service programs and economic development, or a senior citizen program for a loved one, special needs are being met through these supported agencies.

This year, government cutbacks pose a threat to the delivery of services in your community. Your contribution to this viable network of human service organizations will help offset these cutbacks.

In 1983, more than six million people, in the New York City area, were served by one or more of these vital human service organizations.

IMPORTANT DESIGNATION INFORMATION

Designations are encouraged to reflect the wishes of the employees making contributions. A gift of undesignated funds will, to a great extent, be shared among local service agencies.

Contributors who wish to make a gift confidentially may do so by enclosing either a personal check or checks made out to the chosen charity or federation of charities, or cash, in a state envelope sealed by the employee, which shall remain sealed until delivered to the campaign office of the Federated Community Campaign. (United Way of New York City)

Although SEFA can neither encourage nor discourage designations, it is an option available to you the contributor. Any/all designations, whether cash, check or through payroll deduction must be done by completely filling out the white designation card. You may designate all or a portion of your contribution to one or up to three agencies. You may request a receipt from the designated agency.

1) Complete information requested on top portion of white designation card.
(2) Enter agency(s) ID # from brochure in block "ag no".

(3) Insert the full amount you wish the agency(s) to receive. NOTE: THE DOLLAR AMOUNT DESIGNATED CAN NOT EXCEED THE ACTUAL CONTRIBUTION.
(4) Sign and date the white designation card and return to your solicitor.

The following is a listing of participating agencies in the State Employees Federated Appeal.

Most of them provide Human services throughout the five boroughs of New York City.

Telephone numbers have been provided for your convenience if you, your family or friends have need of services.

201 **Bird S. Coler Memorial Hospital Auxiliary**
(212) 688-9400

202 **Black United Fund of New York, Inc.**
(212) 663-7600

203 **Blythedale Children's Hospital**
(914) 592-7555

204 **Bronx Council for the Advocacy of Children and Youth**
(212) 590-3050

205 **Citizens Committee for New York City**
(212) 590-4747

206 **City Hospital at Elmhurst Auxiliary**
(212) 830-1515

207 **Colony-South Brooklyn Houses**
(212) 625-3810

208 **Cumberland Hospital Women's Social Service Committee**
(212) 625-1880

209 **Goldwater Memorial Hospital Auxiliary**
(212) 750-6512

210 **Hebrew Hospital for Chronic Sick, Inc.**
(212) 397-5020

300 International Service Agencies
Member Agencies
(800) 638-8079

301 Aircare
302 Care
303 Foster Parents Plan
304 Helen Keller International
305 International Eye Foundation
306 International Human Assistance Programs
307 International Rescue Committee
308 Oxfam America
309 Pearl S. Buck Foundation, Inc.
310 Planned Parenthood—World Population
311 Project Hope
312 Save the Children
313 Unitarian Universalist Service Committee
314 United States Committee for UNICEF
315 African Medical & Research Foundation (800) 638-8079
316 Church World Service/CROP (800) 638-8079

End ISA Member Agencies

211 Kings County Hospital Center Auxiliary
(212) 630-3131

212 Lincoln Hall
(914) 248-7474

213 Lincoln Hospital Auxiliary
(212) 579-5000

214 Metropolitan Hospital Auxiliary
(212) 360-8262

215 Metropolitan Jewish Geriatric Center
(212) 853-2800

216 NAACP Legal Defense & Education Fund, Inc.
(212) 586-8397

217 National Council of Jewish Women, Inc.
(212) 378-8184

400 National Health Agencies
(315) 457-2343
Member Agencies

401 American Kidney Fund
(800) 638-8299

402 American Heart Association
(212) 661-5335

403 Arthritis Foundation
(212) 000-0000

404 Association for Retarded Citizens
(212) 736-5710

405 Louis J. Solomon
(212) 564-3366

406 Cooley's Anemia Foundation
(212) 598-0911

407 Cystic Fibrosis Foundation
(212) 475-7820

408 Easter Seal Society
(212) 532-8830

409 Juvenile Diabetes Foundation
(212) 889-2860

410 Leukemia Society of America, Inc.
(212) 679-1939

411 March of Dimes Birth Defects Foundation
(212) 882-8430

412 Muscular Dystrophy Association
(212) 247-7410

413 Myasthenia Gravis Foundation
(212) 982-4700

414 National Association for Sickle Cell Disease
(212) 894-8075

415 National Foundation for Ileitis and Colitis
(212) 679-1570

416 National Hemophilia Foundation
(212) 882-5510

417 National Huntington's Disease Foundation
(212) 744-0320

418 National Jewish Hospital/National Asthma Center
(212) 582-0711

419 National Kidney Foundation
(212) 683-8018

420 National Mental Health Association
(212) 582-4901

421 National Multiple Sclerosis Society
(212) 921-9199

422 National Rentinitis Pigmentosa Foundation
(212) 620-2021

424 National Society to Prevent Blindness
(212) 684-3055

425 National Spinal Cord Injury Association
(516) 482-4417

426 Research to Prevent Blindness
(212) 752-4333

427 St. Jude Childrens Research Hospital
(212) 947-3740

428 Tuberous Sclerosis Association of America, Inc.
(516) 669-1298

429 United Cerebral Palsy Association
(212) 677-7400

430 NYS Society for Autistic Children
(518) 436-0611

End NYS NHA Member Agencies

218 Native American Rights Fund
(313) 447-8760

219 New York Diabetes Association, New York Diabetes Affiliate, Inc.
(212) 944-7891

220 New York Medical College, Flower and Fifth Avenue Hospitals
(212) 960-8000

221 OHel Childrens Home & Family Services
(212) 851-6300

222 Planned Parenthood of New York City
(212) 777-2002

223 Puerto Rican Legal Defense & Education Fund, Inc.
(212) 532-8470

224 Queens Hospital Center Auxiliary
(212) 990-3377

225 St. Vincent's Hall, Inc.
(212) 522-3700

226 Sydenham Hospital Auxiliary
(212) 678-5151

500 The United Way of New York City Member Agencies (212) 907-0300

501 Abbott House
(914) 591-7300

502 Ackerman Institute for Family Therapy, Inc.
(212) 879-4900

503 Advocates for Children
(212) 729-8866

504 Agudath Israel of America
(212) 791-1800

505 Altro Health & Rehabilitation Services, Inc.
(212) 684-0600

506 American Diabetes Association New York Diabetes Affiliate, Inc.
(212) 944-7899

507 Angel Guardian Home
(212) 232-1500

508 Archdiocesan Catholic Guild for the Blind
(212) 371-6000

509 Associated YMYWHA's of Greater New York
(212) 751-8880

510 Association for the Help of Retarded Children
(212) 254-8203

511 Astor Home for Children
(914) 876-4081

512 Augustana Lutheran Home
(212) 232-2114

513 B.H.R.A.G.S., Inc.
(212) 778-5484

514 Baptist Home of Brooklyn
(914) 876-2071

515 Beford Stuyvesant Community Mental Health Center
(212) 636-4350

516 Associated Black Charities
(212) 777-6060

517 Associated for Children with Retarded Mental Development
(212) 475-7200

518 Bensonhurst Renaissance, Inc. (AMICO)
(212) 256-1173

519 Bethlehem Day Nursery, Inc.
(212) 532-9319

520 Bialystoker Center & Home for the Aged
(212) 475-7755

521 Big Brothers, Inc.
(212) 688-2042

522 Big Sisters, Inc.
(212) 285-1861

523 Boy's Athletic League, Inc.
(212) 686-8888

524 Boy's Club of New York, Inc.
(212) 533-2550

525 Boys Harbor, Inc.
(212) 427-2244

526 Bridge, Inc.
(212) 724-1200

527 Bronx House
(212) 828-8952

528 Bronx River Neighborhood Centers, Inc.
(212) 991-1100

529 Brooklyn Bureau of Community Service
(212) 875-0710

530 Brooklyn Home for Children
(212) 263-0740

531 Brooklyn Kindergarten Society
(212) 866-5789

532 Brooklyn Lung Association, Inc.
(212) 624-8531

533 Brooklyn Psychiatric Centers, Inc.
(212) 875-7510

534 Brooklyn United Methodist Church Home
(212) 827-4500

536 Brownsville-Ocean Hill Community Mental Health Clinic, Inc.
(212) 467-6441

537 Burden Center for the Aging
(212) 879-7400

538 Camp Chavatzeleth
(212) 473-4500

539 Camp Dora Golding
(212) 89[illegible]-4800

540 Camp Fire Council of Greater New York
(212) 351-1233

541 Camp Isabella Freedman
(212) 242-5886

542 Camp Louemma
(212) 631-3747

543 Camp Rainbow, Inc
(212) 586-2900

544 Camp Sussex, Inc.
(212) 683-8528

545 Camp Vacamas Association, Inc.
(212) 677-3485

546 Cancer Care, Inc.
(212) 679-5700

547 Cardinal Hayes Home for Children
(212) 677-6363

548 Cardinal McCloskey Children & Family Services
(914) 997-8000

549 Cardinal Spellman Center
(212) 677-6600

550 Casita Maria, Inc.
(212) 589-2230

551 Catholic Big Brothers, Inc
(212) 371-1000

552 Catholic Charities Counseling Service
(212) 371-1000

553 Catholic Charities Diocese of Brooklyn
(212) 596-5500

554 Catholic Charities of the Archdiocese of New York
(212) 371-1000

555 Catholic Child Care Society of the Diocese of Brooklyn
(212) 624-5569

556 Catholic Guardian Society
(212) 371-1000

557 Catholic Guardian Society of the Diocese of Brooklyn
(212) 596-5500

558 Catholic Home Bureau
(212) 371-1000

559 Catholic Settlement Association
(212) 875-8801

560 Catholic Youth Organization of the Archdiocese of New York
(212) 371-1000

561 Central Bureau for the Jewish Aged
(212) 308-7316

562 Central Labor Rehabilitation
(212) 532-7575

563 Central Queens YMYWHA
(212) 268-5011

564 Child Welfare Information Services, Inc.
(212) 505-1180

565 Children of Bellevue, Inc.
(212) 561-5216

566 Children's Aid Society
(212) 949-4800

567 Children's Day Treatment Center and School
(212) 873-2280

568 Children's Village
(914) 693-0600

569 Chinese Development Council, Inc.
(212) 966-6340

570 Church Charity Foundation of Long Island
(516) 294-0402

571 Clear Pool Camp
(212) 683-9692

572 Coalition of Voluntary Mental Health, Mental Retardation & Alcoholism Agencies
(212) 586-4555

573 Colony-South Brooklyn Houses
(212) 625-3810

574 Community Action for Legal Services, Inc.
(212) 431-7200

575 Community Council of Greater New York
(212) 777-5000

576 Community Day Nursery, Inc.
(212) 342-3890

577 Community Service Council of Greater Harlem
(212) 926-0821

578 Community Service Society of New York
(212) 254-8900

579 Correctional Association of New York
(212) 254-5700

580 Council of Senior Centers and Services of New York City, Inc.
(212) 228-1666

581 **Daughters of Jacob Geriatric Centers**
(212) 293-1500

582 **Day Care Council of New York, Inc.**
(212) 398-0380

583 **Dominican Sister-Family Health Service, Inc.**
(914) 941-1710

584 **East Bronx Council on the Aging**
(212) 409-0050

585 **East Harlem Council of Human Services**
(212) 289-6850

586 **East Side House Settlement**
(212) 665-5250

587 **The Educational Alliance, Inc.**
(212) 475-6200

588 **Edwin Gould Services for Children**
(212) 679-5520

589 **Eisman Day Nursery**
(212) 663-5124

590 **The Epilepsy Institute**
(212) 677-8550

591 **Epilepsy Society for Social Services, Inc.**
(212) 228-3445

592 **Episcopal Mission Society in the Diocese of New York**
(212) 608-5440

593 **Eye-Bank for Sight Restoration**
(212) 980-6700

594 **Family Consultation Service, Diocese of Long Island, Inc.**
(212) 291-9330

595 **Federation Employment & Guidance Service**
(212) 741-7110

596 **Federation of Jewish Philanthropies of New York**
(212) 980-1000

597 **Federation of Protestant Welfare Agencies Inc.**
(212) 777-4800

598 **Federation of the Handicapped, Inc.**
(212) 242-9050

599 **First Hebrew Day Nursery & Neighborhood House of Brooklyn**
(212) 387-5011

600 **Flatbush Boys' Club**
(212) 462-6100

601 **The Floating Hospital**
(212) 685-0193

602 **Forest Hills Community House Inc.**
(212) 592-5757

603 **Fort Greene Senior Citizens Council**
(212) 638-6910

604 **Fountain House, Inc.**
(212) 582-0340

605 **Frances Schervier Home & Hospital**
(212) 548-1700

606 **Frank D. Whalen Child Care Center**
(212) 993-0059

607 **Fresh Air Fund**
(212) 221-0900

608 **G.L.I.E. Community Youth Program, Inc.**
(212) 733-0333

609 **Girl Scout Council of Greater New York**
(212) 687-8383

610 **Girls Club of New York, Inc.**
(212) 590-4050

611 **Girls Vacation Fund, Inc.**
(212) 532-7050

612 **Goddard-Riverside Community Center**
(212) 873-6600

613 **Good Shepherd Services**
(212) 475-4245

614 Goodwill Industries of Greater New York, Inc.
(212) 728-5400

615 Graham-Windham
(212) 889-5600

616 Grand Street Settlement
(212) 647-1740

617 The Great Kill Community Center, Inc
(212) 350-3555

618 Greater Harlem Nursing Home
(212) 690-7400

619 The Greater New York Fund/United Way/Staten Island Division
(212) 599-7767

620 Green Chimneys Children s Services, Inc
(212) 279-2995

621 Greenwich House-Cooperative Social Settlement Society
(212) 242-4140

622 Greer-Woodycrest Children s Services Hope Farm
(914) 677-5041

623 Grosvenor Neighborhood House
(212) 749-8500

624 Hamilton Grange Day Care Center
(212) 862-1810

625 Hamilton Madison House
(212) 349-3724

626 Harlem Dowling Children s Service
(212) 749-3656

627 Harlem Interfaith Counseling Center
(212) 662-8613

628 Hartley House
(212) 246-9885

629 Hebrew Educational Society of Brooklyn
(212) 241-3000

630 **Hebrew Home for the Aged at Riverdale**
(212) 549-8700

631 **Hebrew Institute for Deaf & Exceptional Children**
(212) 377-7507

632 **Heights & Hill Community Council**
(212) 596-8789

633 **Hellenic American Neighborhood Action Committee, Inc.**
(212) 964-9815

634 **Help & Reconstruction, Inc.**
(212) 688-8080

635 **Hendrix Street Day Nursery, Inc.**
(212) 946-9700

636 **Henry Kaufman Campgrounds, Inc.**
(212) 735-2718

637 **Henry Street Settlement**
(212) 766-9200

638 **Holy Name Center for Homeless Men**
(212) 226-5848

639 **Hope Day Nursery, Inc.**
(212) 234-3333

640 **Hudson Guild**
(212) 760-9800

641 **Incarnation Camp, Inc.**
(212) 689-3355

642 **Industrial Home for the Blind**
(212) 522-2122

643 **Institutes of Applied Human Dynamics**
(212) 231-7000

644 **International Center for the Disabled**
(212) 679-0100

645 **International Social Service American Branch**
(212) 398-9142

646 **Inwood House**
(212) 861-4400

647 Inwood Nursery
(212) 567-5654

648 Jacob A. Riis Neighborhood
(212) 784-3271

649 Jamaica Day Nursery, Inc.
(212) 526-3068

650 James Weldon Johnson Community Centers, Inc.
(212) 860-7250

651 Jeanne Jugan Residence of the Little Sisters of the Poor
(212) 671-2120

652 Jewish Association for Services for the Aged
(212) 724-3200

653 Jewish Board of Family & Children Services
(212) 582-9100

654 Jewish Child Care Association of New York
(212) 490-9160

655 Jewish Community Center of Staten Island Inc.
(212) 981-1500

656 Jewish Community House of Bensonhurst, Inc.
(212) 331-6800

657 Jewish Community Services of Long Island Inc.
(212) 896-9090

658 Jewish Guild for the Blind
(212) 595-2000

659 Jewish Home & Hospital for Aged
(212) 870-5000

660 Jewish Institute for Geriatric Care
(212) 343-2100

661 JHMCB Center for Rehabilitation
(212) 636-1000

662 Karen Horney Clinic, Inc.
(212) 838-4333

663 Kateri Residence
(212) 595-4410

664 Kennedy Child Study Center
(212) 988-9500

665 Kennedy Community Center
(212) 982-6401

666 Kips Bay Boys' Club, Inc.
(212) 683-8800

667 Korean Community Services of Metropolitan New York
(212) 706-0800

668 LaGuardia Memorial House, Inc
(212) 534-7800

669 Lakeside School
(212) 356-7000

670 Lavelle School for the Blind
(212) 882-1212

671 League School
(212) 498-2500

672 Leake & Watts Children's Home, Inc.
(914) 963-5200

673 Legal Action Center
(212) 987-0110

674 Legal Aid Society
(212) 577-3300

675 Lemberg Home & Geriatric Institute
(212) 266-0901

676 Lenox Hill Neighborhood Association
(212) 744-5022

677 Lexington School for the Deaf
(212) 899-8800

678 Lifeline Center for Child Development, Inc.
(212) 740-4300

679 Lincoln Hall
(212) 248-7474

680 **Lincoln Square Neighborhood Center**
(212) 874-0860

681 **Little Flower Children's Services**
(516) 929-6200

682 **Little Sisters of the Assumption Family Health Service**
(212) 289-6484

683 **Louise Wise Services**
(212) 876-3050

684 **Lower East Side Family Union, Inc.**
(212) 925-0728

685 **Lower Eastside Service Center, Inc.**
(212) 431-4610

686 **Lutheran Community Services of Metropolitan New York**
(212) 431-7470

687 **Madison Square Boys' Club, Inc.**
(212) 532-5751

688 **Madonna Residence**
(212) 857-1200

689 **Manhattan Bowery Corporation**
(212) 533-8400

690 **Margaret Tietz Center for Nursing Care**
(212) 523-6400

691 **Martin de Porres Community**
(212) 726-2626

692 **Mary Carroll Center of the Catholic Charities of New York**
(212) 371-1000

693 **Mary Manning Walsh Home**
(212) 628-2800

694 **Maternity Center Association**
(212) 369-7300

695 **McMahon Services for Children**
(212) 986-3418

696 **Meals on Wheels of Staten Island**
(212) 727-4435

697 **Menorah Home & Hospital for Aged & Infirm**
(212) 646-4444

698 **Mental Health Association of New York & Bronx Counties**
(212) 254-0333

699 **Methodist Church Home**
(212) 548-5100

700 **Metropolitan Jewish Geriatric Center**
(212) 853-851-3700

701 **Metropolitan New York Coordinating Council on Jewish Poverty**
(212) 267-9500

702 **Misericordia Hospital Medical Center**
(212) 920-9000

703 **Mission of the Immaculate Virgin**
(212) 984-1500

704 **Morningside Nursing Home**
(212) 863-5800

705 **National Council of Jewish Women, Inc**
(212) 376-8164

706 **Nazareth Nursery**
(212) 243-1881

707 **New York Association for the Blind**
(212) 355-2200

708 **New York City Mission Society**
(212) 674-3500

709 **New York Diet Kitchen Association Children's Health Service**
(212) 865-3927

710 **New York Foundling Hospital**
(212) 472-2233

711 **New York Institute for Human Development**
(212) 838-8033

712 **New York Institute for the Education of the Blind**
(212) 574-1234

713 New York League for the Hard of Hearing
(212) 741-7850

714 New York Lung Association
(212) 889-3370

715 New York Metropolitan Section, Inc.
c/o National Jewish Section, Inc.
(212) 532-4949

716 New York Philantropic League
(212) 534-6660

717 New York Service for the Handicapped
(212) 533-4020

718 New York Service Program for Older People (SPOP)
(212) 787-7120

719 New York Society for the Deaf
(212) 673-8500

720 New York State Council of Voluntary Child Care Agencies
(212) 683-6000

721 New York Therapeutic Communities, Inc. STAY'N OUT
(212) 679-3509

722 New York Urban League
(212) 730-5200

723 North-Eastern Dispensary in the City of New York
(212) 522-2323

724 The Northern Dispensary
(212) 242-5511

725 Northside Center for Child Development, Inc.
(212) 880-1816

726 Norwegian Christian Home & Health Center
(212) 232-2322

727 **Ohel Children's Home & Family Services**
(212) 851-6300

728 **Open Door Child Care Center**
(212) 749-5572

729 **Osborne Association, Inc.**
(212) 673-8833

730 **Parkchester-Bronxdale Day Care Association**
(212) 828-9400

731 **Plus XII Youth & Family Services**
(914) 469-9121

732 **Play Schools Association, Inc.**
(212) 921-2940

733 **Polish American Immigration and Relief Committee, Inc.**
(212) 254-2240

734 **Postgraduate Center for Mental Health**
(212) 689-7700

735 **Presbyterian Senior Services**
(212) 874-6633

736 **Pride of Judea Mental Health Center**
(212) 423-6200

737 **Providence Rest**
(212) 931-3000

738 **Puerto Rican Association for Community Affairs, Inc.**
(212) 673-7320

739 **Puerto Rican Family Institute**
(212) 924-6320

740 **Puerto Rican Organization to Motivate, Enlighten and Serve Addicts (PROMESA)**
(212) 299-1100

741 **Queens Child Guidance Center, Inc.**
(212) 657-7100

742 **Queensboro Council for Social Welfare**
(212) 657-3900

743 Queensboro Lung Association
(212) 526-2557

744 Queensboro Society for the
Prevention of Cruelty to Children
(212) 526-0722

745 Ramapo Anchorage Camp, Inc.
(914) 876-4273

746 Recreation Rooms & Settlement, Inc.
(212) 649-1461

747 Rena Coe Multi Service Center, Inc.
(212) 368-3295

748 Retarded Infants Services
(212) 889-5464

749 Riverdale Community Center at
J.H.S. 141
(212) 796-4724

750 Riverdale Mental Health Center
(212) 796-5300

751 Riverdale Neighborhood House
(212) 549-8100

752 Riverdale Senior Center
(212) 884-5900

753 Rosalie Hall
(212) 920-9800

754 Salem Community Service Council
(212) 678-2709

755 San Jose Day Nursery
(212) 929-5790

756 SCAN-New York Volunteer Parent-
Aids Association, Inc.
(212) 860-2293

757 School Settlement Association, Inc.
(212) 389-1810

758 Seamen & International House
(212) 677-4800

759 Seamen's Church Institute of
New York & New Jersey
(212) 269-2710

760 Search & Care, Inc.
(212) 860-4145

761 Selfhelp Community Services, Inc.
(212) 533-7100

762 Sephardic Home for the Aged
(212) 266-6100

763 Sheltering Arms Childrens Services
(212) 697-4242

764 Sisters Servants of Mary
(212) 829-0428

765 Society for Seamen's Children
(212) 447-7740

766 Society of St. Vincent de Paul
(212) 625-1400

767 South Queens Boys' Club
(212) 441-6050

768 Southeast Bronx Neighborhood Centers
(212) 542-2727

769 Special Citizens Futures Unlimited, Inc.
(212) 599-3360

770 Spence-Chapin Services to Families & Children
(212) 369-0300

771 St. Agnus Hospital
(914) 682-3500

772 St. Benedict Day Nursery
(212) 283-3350

773 St. Cabrini Home, Inc.
(914) 384-6500

774 St. Cecilia's Day Nursery
(212) 534-8423

775 St. Christopher's-Jennie Clarkson Child Care Services, Inc.
(212) 693-3030

776 St. Dominic's Home
(914) 359-3400

777 St. Mary of the Angels Home
Convent Road
(516) 921-0808

778 St. Patrick's Home for the Aged & Infirm
(212) 519-2800

779 St. Vincent's Services, Inc.
(212) 522-3700

780 Stanley M. Isaacs Neighborhood Center
(212) 427-1100

781 State Communities Aid Association
(212) 677-0250

782 Staten Island Aid For Retarded Children
(212) 447-1575

783 Staten Island Family Service, Inc.
(212) 667-8313

784 Staten Island Mental Health Society
(212) 442-2225

785 Steinway Child and Family Developmental Center
(212) 932-3050

786 Sunnyside Community Services, Inc.
(212) 784-6173

787 Surprise Lake Camp
(212) 924-3131

788 Talbot Perkins Children's Services
(212) 697-1420

789 Third Street Music School Settlement
(212) 777-3240

790 TIP Neighborhood House
(212) 893-1224

791 Trail Blazer Camps
(212) 431-8390

792 Union Settlement Association, Inc.
(212) 534-7900

793 Unita Therapeutic Community, Inc.
(212) 589-0551

794 **United Activities Unlimited**
(212) 390-7805

795 **United Home for Aged Hebrews**
(914) 632-2804

796 **United Hospital Fund of New York**
(212) 754-1080

797 **United Neighborhood Houses**
(212) 677-0300

798 **University Settlement Society of New York**
(212) 674-9120

799 **Utopia Children's Center, Inc.**
(212) 663-7375

800 **Vacations and Community Services for the Blind**
(212) 873-2324

801 **Vacations & Senior Centers Association**
(212) 777-5000

802 **Variety Boys' Club of Queens**
(212) 728-0946

803 **Vera Institute of Justice**
(212) 986-6910

804 **Victim Services Agency/Travelers Aid Society**
(212) 944-0013

805 **Victory Day Care Center**
(212) 855-5500

806 **Village Visiting Neighbors**
(212) 929-5869

807 **Virginia Day Nursery**
(212) 288-5220

808 **Visiting Nurse Association of Brooklyn, Inc.**
(212) 636-7570

809 **Visiting Nurse Association of Staten Island**
(212) 442-8480

810 **Visiting Nurse Services of New York**
(212) 794-9200

811 **Volunteer Services for Children, Inc**
(212) 867-2220

812 **The Wartburg Home**
(914) 699-0800

813 **Wartburg Lutheran Home for the Aging**
(212) 498-2340

814 **Westchester-Tremont Day Care Center, Inc.**
(212) 824-7390

815 **Western Queens Nursery School, Inc**
(212) 784-2092

816 **Westside Center for Family Services**
(212) 927-9203

817 **Wildcat Service Corporation**
(212) 578-4585

818 **William Hodsom Community Center, Inc.**
(212) 538-3700

819 **Willoughby House Settlement**
(212) 875-4372

820 **Women's Prison Association & Home**
(212) 674-1163

821 **Working Organization for Retarded Children**
(212) 767-4075

822 **YM-YWHA's of Boro Park**
(212) 438-5921

823 **YM-YWHA's of New York**
(212) 427-6000

824 **YM-YWHA's of the Bronx**
(212) 548-8200

825 **YM-YWHA's of Washington Heights & Inwood**
(212) 569-6200

826 **YM-YWHA's of Williamsburg**
(212) 387-8695

827 YMCA of Greater New York
(212) 564-1300

828 Young Adult Institute & Workshop
(212) 563-7474

829 Youth Counseling League, Inc.
(212) 473-4300

830 YMCA of Brooklyn
(212) 875-1190

831 YMCA of the City of New York
(212) 755-2700

UNITED WAY OF NYC VOLUNTARY HOSPITAL MEMBERSHIP

832 Bayley Seton Hospital
(212) 447-3010

833 Beth Abraham Hospital
(212) 920-5881

834 Beth Israil Medical Center
(212) 420-2000

835 The Bronx-Lebanon Hospital Center
(212) 588-7000

836 The Brookdale Hospital Medical
(212) 240-5000

837 The Brooklyn Hospital-Caledonoan Hospital
(212) 403-8000

838 Brooklyn Jewish Site
(212) 240-1000

839 Cabrini Medical Center
(212) 725-6000

840 Catholic Medical Center of Brooklyn
(212) 657-6800

841 Catholic Medical Center of Brooklyn and Queens, Inc.
(212) 657-6800

842 The Church Charity Foundation of Long Island
(212) 560-6400

843 Flushing Hospital and Medical Center
(212) 670-5000

844 Hillside Division
(212) 470-2000

845 Hospital for Joint Diseases
(212) 598-6000

846 The Hospital for Special Surgery
(212) 535-5500

847 Hospital of the Albert Einstein College of Medicine
(212) 430-2000

848 Hospital of the Holy Family
(212) 875-9200

849 House of the Holy Comforter
(212) 367-8100

850 Institute of Rehabilitation Medicine
(212) 340-7330

851 The Jamaica Hospital
(212) 657-1800

852 Joint Diseases North
(212) 650-4000

853 Kingsbrook Jewish Medical Center
(212) 756-9700

854 Lenox Hill Hospital
(212) 794-4567

855 The Long Island College Hospital
(212) 780-1717

856 Long Island Jewish-Hillside Medical Center
(212) 470-2000

857 Lutheran Medical Center
(212) 270-7679

858 Maimonides Medical Center
(212) 270-7679

859 Manhattan Eye, Ear and
Throat Hospital
(212) 838-9200

860 Mary Immaculate Hospital
(212) 291-3300

861 Memorial Sloan-Kettering
Cancer Center
(212) 794-7000

862 Methodist Hospital of Brooklyn
(212) 780-3000

863 Misericordia Hospital Medical Center
(212) 920-9000

864 Montefiore Medical Center
(212) 920-4321

865 The Mount Sinai Hospital
(212) 650-6500

866 The New York Eye and Ear Infirmary
(212) 598-1313

End UWNYC Member Agencies

867 The New York Hospital
(212) 472-5454

868 New York Infirmary-Beekman
(212) 233-5300

869 New York University Medical Center
(212) 340-7300

870 Peninsula Hospital Center
(212) 945-7100

871 The Presbyterian Hospital in the
City of New York
(212) 694-2500

872 Richmond Memorial Hospital and
Health Center
(212) 356-1900

873 Samuel Schulman Institute for
Nursing and Rehabilitation
(212) 240-5000

874 St. Barnabas Hospital
(212) 960-9000

875 St. Clare's Hospital and Health Center
(212) 586-1500

876 St. John's Episcopal Hospital South Shore
(212) 471-8100

877 St. John's Episcopal Site
(212) 467-7000

878 St. John's Queens Hospital
(212) 457-1300

879 St Luke's Division
(212) 870-6000

880 St. Luke s-Roosevelt Hospital Center
(212) 554-7000

881 The St. Mary's Hospital
(212) 774-4017

882 St. Mary's Hospital for Children, Inc.
(212) 224-0400

883 St. Vincent's Hospital and Medical
(212) 790-7000

884 St. Vincent's Medical Center of Richmond
(212) 390-1234

885 University Hospital
(212) 340-7330

886 Wyckoff Heights Hospital
(212) 963-7272

End of United Way of NYC member agencies

900 Women's Funding Coalition, Inc. (212) 677-1001 Member Agencies

901 Black Women's Development Collective

902 Chelsea Women's Health Team

903 CLUW-NYC Coalition of Labor Union Women

904 CARASA-Committee for Abortion Rights and Against Sterilization Abuse

905 Community Day Care Action Coalition

906 HACER, Inc.-Hispanic Women's Center

907 National Congress of Neighborhood Women

908 Older Women's League-Manhattan Chapter

909 Project Green Hope, Services for Women, Inc.

910 R2N2-Reproductive Rights National Network

911 The Service Fund of NOW-NYC

912 Women in the Trades

913 Women Office Worker's Research and Education Fund, Inc.

914 Women's Counseling Project

End Women's Funding Coalition Agencies

227 USO of Metropolitan New York (212) 697-3840

228 Westside Center for Family Services (212) 927-9203

FIRST YEAR PARTICIPANTS

1001 African Medical & Research Foundation
(800) 638-8079

1002 American Foundation for the Blind
(212) 620-2000

1003 Boy Scouts of America Greater New York Council, Inc.
(212) 242-1100

1004 Bronx Legal Services
(212) 993-8250

1005 Church World Service/Crop
(800) 223-1310

1006 Deafness Research Foundation
(212) 684-6558

1007 Family Dynamics, Inc.
(212) 260-4344

1008 St. Christopher's Home
(516) 671-1253

1009 The Fifty Two Association for the Handicapped
(212) 986-5281

1010 Tourette Syndrome Assoc.
(212) 224-2999

1011 United Negro College Fund/Student Welfare Fund

1012 Wildcat Service Corporation
(212) 219-9700

1013 American Near East Refugee Aid
(800) 638-8079

First year agencies' participation limited to receipt of designated contributions only.

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"TREND SETTER"

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SEFA ENCOURAGES PAYROLL DEDUCTIONS.

No. 84-312

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

October Term, 1984

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE AMERICAN JEWISH COMMITTEE, THE NATIONAL COUNCIL OF JEWISH WOMEN, THE SYNAGOGUE COUNCIL OF AMERICA AND THE UNION OF AMERICAN HEBREW CONGREGATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Of Counsel:
RICHARD T. FOLTIN
The American Jewish Committee

Question Presented

Whether since-rescinded Federal regulations, which excluded from the Combined Federal Campaign certain charitable organizations solely because those organizations use litigation to achieve their health and welfare purposes, are consistent with the First and Fifth Amendments.

Statement of Interest

The American Jewish Committee, The National Council of Jewish Women, The Synagogue Council of America and The Union of American Hebrew Congregations, as *amici curiae*, respectfully submit this Brief supporting affirmance of the decision below. The Brief was prepared by the American Jewish Committee.

The American Jewish Committee ("AJC"), a national organization of approximately 50,000 members founded in 1906, believes that the defense of the civil rights and civil liberties of American Jews may best be accomplished by safeguarding the civil rights and civil liberties of Americans generally. AJC is committed to the belief that full protection of the First Amendment rights of all Americans, including their right of access to the courts, and to the forums created by their Government, is essential to the preservation of the pluralistic values which are an integral part of this nation's constitutional framework.

The National Council of Jewish Women ("NCJW"), the oldest major Jewish women's organization in the United States, expresses its commitment to advancing

human welfare through the activities of volunteers engaged in a multi-facted, coordinated program of education, advocacy and service. It believes a pluralistic democratic society is dependent upon the collective efforts of the public and private sectors and is strengthened by the commitment and contribution of volunteers and the nonprofit sector. NCJW opposes denial of access by potential contributors to health and welfare organizations which advocate and litigate on behalf of the public good.

The Synagogue Council of America ("SCA") is a national Jewish organization which includes within its membership the three national rabbinic organizations of Reform, Conservative and Orthodox Judaism and the three national congregational organizations of Reform, Conservative and Orthodox Judaism. SCA desires to preserve the right of charitable organizations and those concerned with the public interest to use all legal means to press their concerns. In the opinion of SCA, although there may be legitimate standards which could be applied in regulating which organizations may participate in the Combined Federal Campaign, reference to whether or not a particular organization uses the court system to achieve its objectives is not such a legitimate standard.

The Union of American Hebrew Congregations ("UAHC") is the parent congregational body of Reform Judaism, serving 783 synagogues throughout the United States and Canada, with a membership of approximately one million persons. UAHC has long been dedicated to the promotion of equality in all aspects of American life, and believes that fair and equitable treatment should be afforded health and welfare organizations which utilize litigation to achieve their purposes.

To the best of their knowledge, none of *amici* are participants in the Combined Federal Campaign.

In the view of *amici,* the Combined Federal Campaign should properly be viewed as a limited public forum and the appropriate standards of review applied to the regulation of access to that forum. Denial of access to such a governmental limited public forum by reference to a content-based distinction should be permitted only in the light of a scrutiny which incorporates the "special constitutional solicitude" which is mandated whenever freedom of expression is regulated. *Amici* further believe that whether the Combined Federal Campaign is viewed as a public or a nonpublic forum, the Government has not made a sufficient showing to overcome the First Amendment interests implicated when, as here, a distinction is made among participants in such a governmental forum based on the content of the communications proposed to be made by those participants. This is especially so when, as here, the content-based differential treatment explicitly excludes from participation those charitable, health and welfare organizations that engage in the legitimate and constitutionally-protected utilization of their right of access to the courts, and thus impermissibly burdens that protected activity.

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No. 84-312

IN THE

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DONALD J. DEVINE, Director,
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INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE AMERICAN JEWISH COMMITTEE, THE NATIONAL COUNCIL OF JEWISH WOMEN, THE SYNAGOGUE COUNCIL OF AMERICA AND THE UNION OF AMERICAN HEBREW CONGREGATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

This Brief is submitted with the consent of the parties. The original letters reflecting the granting of such consent are being filed with the Clerk of this Court.

Statement of the Case

Amici incorporate by reference the Statement of the Case set forth in the Brief to be filed by respondent. The Opinion of the Court of Appeals is reported at 727 F.2d 1247 (D.C. Cir. 1984). The Opinion of the District Court is reported at 567 F. Supp. 401 (D.D.C. 1983).

Summary of Argument

The Combined Federal Campaign (the "CFC") should properly be viewed as a limited public forum (i.e., public property which may not ordinarily constitute a public forum but which has been opened, at least temporarily and for certain purposes, for use by the public as a place for expressive activities) under the tripartite classification enunciated in *Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37 (1983). As the exclusive vehicle for charitable solicitation of Federal employees at their workplaces, the CFC cannot reasonably be said to be a nonpublic forum.

The courts below each properly found that the charitable organizations which the Government had accepted for participation in the CFC share with the respondents, who were barred from such participation under the challenged regulation, a common status as organizations which provide "health and welfare services." The courts below further properly found that the Government's refusal to allow respondents access to the CFC solely on the grounds that they utilize litigation to achieve their health and welfare purposes constituted a content-based distinction. The Government has not shown a compelling state interest which is sufficient to overcome the First Amendment interests implicated when it restricts the access of certain charitable, health and welfare organizations to a limited public forum based upon the content of their proposed communications.

Moreover, even were the Court to find that the CFC is a nonpublic forum the challenged regulations would constitute a violation of the First and Fifth Amendments in that they invidiously discriminate among various health and welfare organizations. The governmental purpose served by the CFC (provision of a means for the Government to cooperate with and assist voluntary health and welfare organizations in soliciting funds from Federal personnel) has nothing to do with the means utilized by these various organizations to achieve their health and welfare purposes, particularly when the basis for the distinction between the barred organizations and those accepted for participation in the CFC is the former organizations' utilization of the legitimate and constitutionally-protected activity of litigation in order to achieve those purposes. Whether respondents' access to the CFC is viewed as a right or as, improbably, a benefit, it is simply improper for the Government to deny access thereto by reference to respondents' exercise of a constitutionally privileged means of expression.

ARGUMENT

The Challenged Federal Regulations' Denial of Access to the Combined Federal Campaign to Certain Health and Welfare Organizations Solely Because Those Organizations Utilize Litigation to Achieve Their Purposes Violates the First and Fifth Amendments.

On February 10, 1983, President Reagan issued Executive Order No. 12404, 3 C.F.R. 151, which established the criteria as to which charitable organizations are eligible to participate in the Combined Federal Campaign (the "CFC"). That Executive Order, which amended Executive Order No. 12353 of March 23, 1982 (the prior Executive Order setting forth the applicable criteria for participation in the CFC), provided, in pertinent part, that:

> . . . [E]ligibility for participation in the Combined Federal Campaign shall be limited to voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families. . . . Such services must directly benefit human beings, whether children, youth, adults, the aged, the ill and infirm, or the mentally or physically handicapped. Such services must consist of care, research or education in the fields of human health or social adjustment and rehabilitation; relief of victims of natural disasters and other emergencies; or assistance to those who are impoverished and therefore in need of food, shelter, clothing, education, and basic human welfare services.
>
> . . . Agencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves shall not be deemed charitable health and welfare agencies and shall not be eligible to participate in the Combined Federal Campaign.

This Brief demonstrates that the since-rescinded CFC eligibility criteria, enacted as regulations, 5 C.F.R. Pt. 950, pursuant to Executive Order No. 12404, barring participation in the CFC by "legal defense funds" (i.e., non-profit organizations which provide legal services to clients on the basis of whether or not the clients have a cause, claim or defense that the organization wishes to advance), should be subjected to strict scrutiny in order to determine whether they constitute a sufficiently narrow restriction in the service of a compelling government interest. They should not merely be examined as to whether they bear a reasonable relationship to a legitimate government interest. This conclusion arises out of two analytically distinct bases:

> (i) The CFC is a limited public forum, and the challenged regulations' reference to the means utilized by legal defense funds in achieving their health and welfare objectives is a content-based distinction. As such the challenged regulations are subject to strict scrutiny.
>
> (ii) The challenged regulations specifically differentiate among charitable, health and welfare organizations on the basis of whether they engage in the legitimate and constitutionally-protected activity of litigation. Even if, *arguendo*, the CFC is not a limited public forum, the utilization of the suspect criterion would require strict scrutiny in order to protect respondents' rights under the First and Fifth Amendments.

It is submitted that, once strict scrutiny is applied, the challenged regulations must be held unconstitutional.

I. The Combined Federal Campaign Is a Limited Public Forum, and the Regulations Denying Respondents Access Thereto Are Inconsistent With the First Amendment.

In *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37 (1983) ("*Perry*"), the Court held that the extent to which the First Amendment protects access to government property is dependent upon the nature of that property:

> (i) In "traditional public forums", such as parks and streets, the Government may not prohibit communicative activity, and, while permitted to enact reasonable time, place and manner regulations, may enforce content-based regulations and/or exclusions with respect to those forums only if those regulations are necessary to serve a compelling state interest and are narrowly drawn to achieve that end. *Id.* at 45.
>
> (ii) In "limited public forums" (i.e., government property that, while not of a historically open character, has been opened to the public as a place for at least certain communicative activity) the Government, while having no obligation to indefinitely maintain the public nature of such facilities, "as long as it does so . . . [,is] bound by the same standards as apply in a traditional public forum." *Id.* at 45-6.
>
> (iii) In what have come to be termed "nonpublic forums" (i.e., government property that is not considered a "forum for public communication," either by tradition or by designation), the Government may, in addition to the reasonable time, place and manner regulations permitted with respect to a public forum, selectively deny access in order to "reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 46.

While the Government argues that the CFC "clearly falls within the nonpublic forum category" (Pet. Brief at 23), it is submitted that the CFC should properly be viewed as a limited public forum under the *Perry* tripartite classification.

The CFC has, since 1961, been the only means by which charities may solicit federal civilian and military personnel at their workplaces. As the petitioner himself testified in March 1983 before a Congressional Subcommittee on Manpower and Housing, however, "charity appeals in the Federal workplace did not begin" with the CFC. (J.A. 308). Already well prior to 1961, voluntary health and welfare agencies were permitted to make extensive and multiple appeals to Federal employees, with only rudimentary regulation.

As the petitioner's 1983 testimony further reflects, the statement of purported objectives set forth in Executive Order No. 12404 (objectives that are now relied upon by petitioner in barring respondents from participation in the CFC), was not enacted until more than twenty years after creation of the CFC—and only after the courts had found that prior regulations governing the CFC, which also barred respondents, were constitutionally deficient. (J.A. 313). That *post hoc* statement of objectives provides that:

> The objectives of the Combined Federal Campaign are to lessen the burdens of government and of local communities in meeting needs of human health and welfare; to provide a convenient channel through which Federal public servants may contribute to these efforts; to minimize or eliminate disruption of the Federal workplace and costs to Federal taxpayers that

> such fund-raising may entail; and to avoid the reality and appearance of the use of Federal resources in aid of fund-raising for political activity or advocacy of public policy, lobbying, or philanthropy of any kind that does not directly serve needs of human health and welfare.

Executive Order No. 12404. However, neither the Government's enactment of the challenged regulations, nor the *post hoc* statement of objectives which accompanied Executive Order No. 12404, can change the CFC's fundamental nature.

The right of charitable organizations generally to engage in the "communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes," all of which is inextricably tied in with the act of solicitation, is protected by the First Amendment. *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). While the Federal workplace is, concededly, not a traditional public forum, the Government, in setting aside a portion of that workplace at a particular time each year in order to enable charitable organizations to solicit from Federal workers, seems plainly to have provided an extension into that forum of an opportunity for charities to exercise their First Amendment rights. That the permitted solicitation consists, in each case, only of a 30-word statement, which the Government argues is subject to editing and approval by government employees, and is included in leaflets which are distributed by government employees during a specified period,[1]

1. Respondents assert, and the court below has found, that the Government has not exercised as much control over the text and distribution of the solicitation materials as petitioner has claimed. However, even if the Government's version of this matter is accepted, the above analysis would still apply.

does not, as the Government has suggested, deprive that communication of its status as an expressive activity worthy of First Amendment protection.

Charitable solicitations, like other expressions protected by the First Amendment, are subject to reasonable time, place and manner restrictions, *see, e.g., Heffron* v. *Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 647 (1981), which restrictions are permissible "so long as they are justified without reference to the content of the regulated speech, . . . serve a significant governmental interest and . . . in doing so . . . leave open ample alternative channels for communication of the information." *Id.* at 648, *quoting Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). When the Government opens up the Federal workplace to charitable solicitations, the peculiar needs of that forum may mandate time, place and manner regulations pursuant to which a solicitation must be made in a particularly rigorous format. However, that ability to set appropriate regulations should not be "bootstrapped" into the dubious proposition that no First Amendment rights are involved at all, or the equally questionable proposition that, in making such time, place and manner regulations, the Government may allow certain charities access to the workplace, and others sharing a common status no such access at all.

Nor is the Government's comparison of the CFC to several facilities which the Court has found to be nonpublic forums well-placed. In each of those cases (*United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) (postal mailboxes); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S.

119 (1977) (prisons); *Adderley* v. *Florida*, 385 U.S. 39 (1966) (prisons); *Greer* v. *Spock*, 424 U.S. 828 (1976) (military bases); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (municipal transporation systems); and *Perry* (internal school mailing system)), the Court's holding that a forum was "nonpublic" was premised either on a finding that the exercise of First Amendment rights would be disruptive of the proper functioning of the governmental activity at that property (*Greenburgh; Jones; Adderley; Greer; Perry*) or, in the context of the particular forum involved, would impose on a "captive audience" a viewpoint that that audience might find objectionable (*Lehman*). However, the Government, by the very act of opening up its facilities to charitable organizations has determined that such solicitations, at least in the organized form represented by the CFC, is *not* disruptive of the workplace; nor may this case be compared to *Lehman*, since it could hardly be said that Federal employees are "captive audiences" of brief,, written solicitations which they are free to deposit in the wastebasket.

For the Government to point to the above-mentioned cases as evidence that the Court need not provide access to the CFC which is appropriate to a limited public forum begs the question that must be considered: whether in *this* instance the Government has given an otherwise "nonpublic" forum the open character, at least for a particular subject matter, that is associated with a public forum. These cases stand for the proposition that the allowance of selective access to a facility may not *necessarily* transform a facility into a limited public forum. However, the Court must still consider whether the allowance of access

to the CFC has not opened that facility "as a place for expressive activity," at least for certain groups or for the discussion of certain subjects. Thus, in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), a state university, which was otherwise a nonpublic forum, became a limited public forum by reason of the Government's action in opening up that university's facilities for meetings of student groups.

Perry supports the conclusion that the CFC is a limited public forum. In that case, the Court, in holding that the school's internal mailing system was a nonpublic forum and that the school was entitled to permit access thereto to the recognized bargaining representative, while denying such access to a rival union, stated that "[*w*]*hen* government property is not dedicated to open communication the government may . . . restrict use to those who participate in the forum's official business." *Id.* at 52 (emphasis supplied). Thus, in *Perry*, the Court found that the recognized bargaining representative had official duties distinguishable from those of the plaintiff and that the exclusive access policy was closely tailored to the official responsibilities of that representative. *Id.* at 53 n.13. It is evident, however, that determination of whether a particular forum is (or is not) one that has been "dedicated to open communication," must be made on the basis of various factors—one of which, the holding of *Perry* logically suggests, is whether the forum has been opened to those who do *not* "participate in the forum's official business."

Significantly, while the Court held in *Perry* that the school's internal mail system was not a public forum with

respect to the general public, including the plaintiff union, the Court left open the possibility that the school might be deemed a "limited public forum" for organizations comparable to the "YMCA, Cub Scouts, and other civic and church organizations" which were allowed access to the school's internal mail facilities. The Court stated:

> Moreover, even if we assume that by granting access to the Cub Scouts, YMCA's, and parochial schools, the School District has created a "limited" public forum, the constitutional right of access would in any event extend only to other entities of similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as [the plaintiff union], which is concerned with the terms and conditions of teacher employment.

Id. at 48. Thus, implicit in *Perry's* reasoning is the notion that the granting to certain types of organizations of access to governmental facilities, where those organizations do not have a clear official function, may create a "limited public forum" to which entities of similar character have similar rights of access. Moreover, since First Amendment rights are involved, the Court must not take at face value a governmental assertion that a particular communicative activity does constitute a portion of the forum's official business and therefore gives rise to no rights of access on behalf of other parties. Otherwise, the Government might, by a self-serving statement, transform a limited public forum into a nonpublic forum.

In light of the foregoing, it is submitted that the CFC is a limited public forum. As discussed above, charitable

organizations have, since long before the creation of the CFC, been permitted access to Federal workers for solicitation purposes. At no time prior to the issuance of Executive Order No. 12404 was it suggested that the CFC was intended to "lessen the burdens of government and local communities," as is now set forth in that Order, nor was it suggested that the CFC otherwise fulfills an official function of the various governmental agencies at which solicitations were made. Rather, as reflected in the *Manual on Fund-Raising Within the Federal Service* (the "*Manual*"), the CFC's stated objective was "to cooperate with and assist voluntary health and welfare agencies in soliciting funds for worthy causes from Federal personnel." *Manual* at 1. Thus, the forum was created to grant access to Federal offices which were of an historically non-open character for certain communicative activity—the very definition of a limited public forum. In allowing charities to solicit in the Government workplace through the CFC, the Government—as a District Court found in a decision not appealed by the Government—furnished, in effect, "a billboard or channel of communication through which organizations can disseminate their appeals to federal workers." *NAACP Legal Defense & Educational Fund, Inc.* v. *Campbell*, 504 F. Supp. 1365, 1367 (D.D.C. 1981).

While the Government has no obligation indefinitely to maintain a limited public forum once it is created, it would empty the classification of any meaning to suggest that the Government could transform such a forum into a nonpublic forum by the simple act of enunciating a new set of objectives once it was found by a court that, under the objectives and regulations previously promulgated, the

Government had created a limited public forum—especially when the Government all the while maintained essentially the same set of regulations and continued to allow access to that forum by essentially the same group of entities as were permitted access until the court struck down the earlier provisions. This is, in essence, what, post-*Campbell*, the Government sought to do by enacting Executive Order No. 12404 and the challenged regulations.

As a limited public forum, then, access to the CFC is subject to the "special constitutional solicitude" which the protection of First Amendment rights demands. *Widmar*, 454 U.S. at 276. *Perry* clearly asserts that, while the government may limit access to a limited public forum to "entities of similar character," it may not discriminate among "similar" groups on the basis of the content of their proposed messages. 460 U.S. at 48. The District Court herein properly found, and the Court of Appeals properly affirmed, that the focus of the challenged regulations on the litigation activity in which the legal defense funds were engaged, as a basis for exclusion of those organizations, was content-based: "As the 'expression' protected under the First Amendment in an act of charitable solicitation is a request for contributions, the 'content' of that expression is the accompanying statement of how these contributions will be used." 567 F. Supp. at 407. As the Court of Appeals herein reasoned, the challenged ". . . differential treatment of like entities raises the serious possibility that a speaker, or class of speakers, has been excluded from a forum, not in furtherance of a legitimate interest of the

Government, but instead simply because the speaker ha[d] been viewed disfavorably by the Government." 727 F.2d at 1259.

The Government asserts that the respondents are not similarly situated with the organizations to whom access to the CFC was granted, save perhaps that both groups are charitable organizations within the meaning of section 501(c)(3) of the tax code, and suggests that the decision below should be understood as mandating access to the CFC by all section 501(c)(3) organizations. That is not the case.

The record demonstrates that the litigation efforts of respondent NAACP Legal Defense and Educational Fund have resulted in *direct* benefits to hundreds of thousands of persons, "such as income supplementation in the form of back pay and future earnings, better educations, improved health care, better housing and other living conditions, humane conditions of incarceration and, in the case of our capital punishment program, life itself." (J.A. 121-2). Similarly, there is no dispute that through the litigation activities of respondent Puerto Rican Legal Defense and Education Fund, Inc. "large numbers of *identifiable individuals* have secured the opportunity to obtain or retain employment, have been afforded new and improved housing accommodations and have received increased access to improved bilingual education and increased access to government benefits." (J.A. 237, emphasis supplied). A review of the affidavits submitted on behalf of the other respondents[2] demonstrates that they too have secured comparable services that "*directly* serve needs of human health and welfare." (Exec. Order No. 12404, emphasis supplied).

2. *See, e.g.*, J.A. 249, 252-4, 258.

Thus, to use the language of *Perry* (and unlike the parties in *Perry*) respondents share the same "status" as the organizations afforded entry to the CFC, *e.g.*, all are intent on achieving health and welfare benefits for individuals, whether by paying money directly from their coffers to beneficiaries or by utilizing their resources to obtain those benefits from the Government or other appropriate third parties.

The Government has, at an earlier date, acknowledged that legal defense funds are properly to be regarded as similarly situated with other health and welfare organizations. On March 23, 1982, the President issued Executive Order No. 12353, which specifically provided that legal defense funds would be included among organizations that provided health and welfare services and were thus entitled to participation in the CFC. With the final approval of regulations issued pursuant to that order, the U.S. Office of Personnel Management issued a press release declaring that it was OPM Director Donald Devine's judgment that ". . . some of the earlier criteria were overly restrictive," and that the proposed language had, in fact, been changed so as to make clearer that "legal defense, minority and women's organizations" *were* entitled to participate in the CFC (J.A. 86).[3] Thus, the circumstances surrounding the issu-

3. Section 950.101 of the regulations enacted pursuant to Executive Order No. 12353, 47 Fed. Reg. 29496 (1982), later replaced by the regulations enacted pursuant to Executive Order No. 12404, provided, in pertinent part, as follows:

> For purposes of this part: (a) the term "national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate" means national entities that:
>
> (1) Meet all eligibility requirements established in this Part, except as limited hereinafter;

(footnote continued on next page)

ance of Executive Order No. 12353 and related regulations seem to belie the Government's assertion that those enactments were undertaken only in response to court order, and without conceding the inappropriateness of the earlier criteria. Certainly, the pronouncements in connection with that issuance could have been made in more restrained fashion if that were the case.

It does not take too jaundiced an eye to speculate that where, as here, the Government differentiates between types of organizations which all serve the same health and welfare purposes, the underlying motive is not any difference between the purposes ultimately served by the agencies, but rather an inherent disfavor of resort to the courts to effect those purposes generally—because the result of those litigations, although resounding to the direct benefit of individuals, may ultimately cost the Government additional money. To allow the Government to attempt, in this indirect fashion, to avoid its obligations, would indeed be untenable.

None of the grounds asserted by the Government for denying respondents access to the CFC are "narrowly drawn to effectuate a compelling state interest," as is required when a content-based restriction is enacted with reference to a public forum. While not wishing to repeat

> (2) Are not "action" organizations within the meaning of 26 CFR 1.501(c)(3)-1(c)(3) and are eligible to receive tax deductible contributions under 26 U.S.C. 170; and
>
> (3) Provide or substantially support one or more of the following services:
>
> . . . (vii) Delivery of legal services to the poor and indigent, and defense of human and civil rights secured by law . . .

the discussion of this point set forth in the briefs of respondents and of fellow *amici*, the following should be noted regarding the statement of objectives which introduces Executive Order No. 12404.

With respect to the initial statement that the CFC is intended "to lessen the burdens of government and of local communities in meeting needs of human health and welfare; to provide a convenient channel through which Federal public servants may contribute to these efforts; [and] to minimize or eliminate disruption of the Federal workplace and costs to Federal taxpayers that such fund-raising may entail," it has already been shown that the legal defense funds advance the same health and welfare purposes as the organizations allowed access to the CFC. The Government has referred to the controversy engendered by the participation of certain legal defense funds in the CFC as justification for the challenged regulations. However, the mere fact that the views to be expressed by a party are controversial is insufficient to justify denial to that party of access to a forum. *Police Department* v. *Mosley*, 408 U.S. 92, 96 (1972). Thus, even treating the stated objectives as other than a *post hoc* rationalization, the desire to advance those purposes, and to enact rules that allow these purposes to be accomplished efficiently and without disruption, cannot justify, as compelling state interest, a regulation that bars respondents' participation in the CFC.

One is left, then, with the Government's assertion that the challenged regulations are necessary "to avoid the reality and appearance of the use of Federal resources in aid of fund-raising for political activity or advocacy of public policy, lobbying, or philanthropy of any kind that does not directly serve needs of human health and welfare."

However, the CFC does not represent in "reality" or in "appearance" a use of Federal resources for "advocacy of public policy, lobbying or philanthropy of any kind that does not directly serve needs of human health and welfare." Firstly, if the objective is to avoid government identification with organizations that do not "directly serve needs of human health and welfare," this objective does not apply to the legal defense funds since they "directly serve" these needs. Secondly, the governmental incurrence of the costs necessary to allow access to a public forum involves only maintenance of an already created forum. These administrative costs cannot be compared to the very real subsidy which governmental allowance of a tax-deductible contribution represents, and, thus, do not constitute a "subsidy" sufficient to change the Government's First Amendment obligations with respect thereto. *Compare Regan* v. *Taxation with Representation of Washington*, 103 S. Ct. 1997 (1983), *with Widmar* v. *Vincent*, 454 U.S. at 272-3 and n.12. Thirdly, as to any "appearance" of governmental support, as the District Court noted, an appropriate statement of the CFC's neutral role, inserted by the Government in each soliciation package, would more than eliminate any danger of governmental identification with the soliciting organizations.

II. Whether the Combined Federal Campaign Is Regarded as a Public or a Nonpublic Forum, the Challenged Regulations Impermissibly Burden a Protected First Amendment Activity.

The Government's position is premised on the argument that the CFC should properly be regarded as a nonpublic forum. Even assuming, *arguendo*, that this position is correct, there is no question—and the Government so concedes (*see* Petitioner's Brief at 29 n.22 and 46 n.37)—

that the regulations which set standards for access to the CFC are subject to the equal protection obligations which are applicable to the Federal Government through the Fifth Amendment. Respondents' brief (not to mention the opinion of the Court of Appeals below) more than adequately demonstrates that the challenged regulations do not, in fact, bear that necessary reasonable relationship. *Amici* will not burden the Court with yet another statement of that point.

Rather, this point is addressed to an additional aspect of this matter which bears emphasis. Even if the CFC is to be regarded as a nonpublic forum, the standards to be applied in determining who shall have access thereto must, of course, be *legitimate* standards that do not give rise to an invidious discrimination. Where distinctions are made between individuals that impact on fundamental First Amendment rights, the Fifth Amendment requires that such distinctions be supported by compelling state interest and that they be narrowly drawn so as not unnecessarily to impede those interests. *See Shapiro* v. *Thompson,* 394 U.S. 618 (1969). The Government, in denying respondents access to the CFC solely because they have exercised the First Amendment right to associate for purposes relating to public-interest litigation, has selected an inappropriate standard and it has demonstrated no compelling state interest which justifies that selection.

That the activities in which respondents are engaged are constitutionally protected is beyond cavil. In *NAACP* v. *Button,* 371 U.S. 415 (1963), this Court held that, in the context of the NAACP's objectives of seeking legal redress for infringements of individuals' constitutionally guaranteed rights, that organization's litigative activities were

"modes of expression and association protected by the First and Fourteenth Amendments." In later decisions this Court clarified that *Button* had established the principle that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *In re Primus,* 436 U.S. 412, 426 (1978), *quoting United Transportation Union* v. *Michigan Bar,* 401 U.S. 576 (1971).

While the Government has asserted that respondents have been excluded from participation in the CFC simply because they do not fall within the classification of "traditional health and welfare organizations", there is, as is shown in Section I, *supra,* no cognizable difference between respondents and the so-called "traditional" charities—except for respondents' exercise of the First Amendment rights recognized in *Button* and *Primus.* Were it not for that exercise of their constiutional rights they would be permitted access to the CFC, as are all other health and welfare agencies.

Clearly, if respondents have a First Amendment right to participate in the CFC that right cannot be conditioned by the Government on their abandonment (as least to the extent that it constitutes more than 15% of their expenditures, *see* 5 C.F.R. §950.101(a)(2)) of their right to engage in "litigation on behalf of others", at least in the absence of compelling state interest and a showing that the regulation has been drawn with appropriate narrowness. Given the fundamental nature of the latter right, this would be the appropriate standard regardless of whether the CFC is regarded as a public or a nonpublic forum.

Even if access to the CFC is, improbably, classified as a "benefit," rather than a "right," strict scrutiny would be appropriate. The principle that "the government may not deny a benefit for a person because he exercises a constitutional right" was enunciated as recently as *Regan* v. *Taxation With Representation,* 103 S. Ct. at 2001. In *Regan* the Court upheld the Internal Revenue Service's denial of a corporation's application for section 501(c)(3) status because that corporation's activities consisted of attempting to influence legislation, even though that activity was concededly protected by the First Amendment. The Court reasoned that the challenged Internal Revenue Code provision did not infringe upon or regulate any First Amendment activity, but, rather, simply constituted Congress' declination to pay for such activity. In reaching that holding, however, the Court specifically distinguished *Speiser* v. *Randall,* 357 U.S. 513 (1958), and *Perry* v. *Sindermann,* 408 U.S. 593 (1972), cases in which the Court found that "unconstitutional conditions" had been placed on activities protected by the First Amendment. This case fits the "*Speiser-Perry* model", *Regan,* 103 S. Ct. at 2001, much more closely than it does the "*Regan*" model.

In *Speiser,* California enacted a regulation which required anyone who wished to utilize a property tax exemption to sign a declaration stating that he did not advocate the forcible overthrow of the Government of the United States. The Court held that the regulation was unconstitutional because "[t]o deny an exemption to claimants who engage in speech is in effect to penalize them for such speech." *Id.,* 357 U.S. at 518. In *Perry* v. *Sindermann,* the Court held that lack of a contractual or tenure right to

re-employment, taken alone, did not defeat a teacher's right to a hearing of his claims that a state college's nonrenewal of his contract was because of his criticism of the college's governing board. In so holding the Court stated that the teacher could not be denied a benefit on a basis that infringed his constitutionally-protected interest in free speech. *Id.,* 408 U.S. at 597.

Justice Blackmun specifically noted in his concurring opinion in *Regan* that the challenged tax provision was sustainable only because of the necessary assumption that the Internal Revenue Service, in enforcing the lobbying restrictions, required an organization qualified under section 501(c)(3) and its lobbying affiliate with tax exempt status under section 501(c)(4) only to be separately incorporated and to keep records adequate to show that the tax deductible contributions were not used to pay for lobbying. Any further restrictions, which would in effect prevent section 501(c)(4) organizations from lobbying explicitly on behalf of their section 501(c)(3) affiliates, "would extend far beyond Congress' mere refusal to subsidize lobbying . . . [and] would render the statutory scheme unconstitutional." *Id.,* 103 S .Ct. at 2005; *cf., Cammarano* v. *U.S.,* 358 U.S. 498, 513 (1959) ("Petitioners are not being denied a tax deduction *because* they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets . . .") (emphasis supplied).

In neither *Regan* nor *Cammarano* was the taxpayer restricted in any respect from carrying out its First Amendment right of lobbying by the challenged tax provisions. The instant case is clearly more akin to *Speiser*

and *Perry* v. *Sindermann*. Under the challenged regulations, respondents' access to Federal workers through the CFC is explicitly made contingent on whether respondents utilize their First Amendment right to litigate on behalf of others. Thus, there is an actual and undeniable restriction of access to Federal workers allowed to similarly-situated others—unlike *Regan* and *Cammarano* in which actual access of lobbyists to legislators was restrained not at all.

Nor would allowing respondents access to the CFC on this basis necessitate allowing similar access to *all* section 501(c)(3) organizations. With respect to a limited public forum, and *a fortiori* with respect to a nonpublic forum, the Government may limit access to groups sharing a common status, based upon a standard that is truly content-neutral. *Perry*, 460 U.S. at 45-6. As has been discussed, the challenged regulations, while they pretend to content-neutrality, in fact distinguish among organizations with common health and welfare purposes exclusively on the basis that certain of those organizations utilize a constitutionally-protected activity to achieve those purposes.

Accordingly, the challenged regulations are only sustainable if they are justified by compelling state interest and are sufficiently narrowly drawn. As has been discussed in Section I, *supra*, those regulations do not satisfy that standard and on that basis, were properly stricken.

Conclusion

The judgment of the court below should be affirmed.

Respectfully submitted,

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No. 84-312

In the Supreme Court of the United States

OCTOBER TERM, 1984

DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In our opening brief we showed that the longstanding limitation of the Combined Federal Campaign to traditional health and welfare charities, now codified in Executive Order No. 12,404, 3 C.F.R. 151, is reasonable and therefore consistent with the First Amendment. Respondents and their amici have failed to offer any persuasive reason why the President is constitutionally required to include advocacy groups as beneficiaries of the Campaign.

1. In their efforts to portray this case as involving a forum for expressive activity, respondents and their amici lose sight of the fundamental nature of the Campaign. The Campaign is an employer-sponsored charity drive, similar to drives conducted in public and private workplaces throughout the country. When President Kennedy established the Campaign in 1961, the point was not to create some variation on Hyde Park that would afford charities an opportunity to engage in expressive activity; rather, the purpose was to encourage federal employees to make contributions to a limited number of charities by providing a convenient mechanism for doing so, while minimizing disruption in the federal workplace. See Pet. Br. 4-6, 25.[1]

The Campaign has always been a closely regulated activity, controlled by the federal government in vir-

[1] Respondents (Br. 20-21) and their amici (NCRP Am. Br. 11-14; American Jewish Comm. Am. Br. 8-14; ACLU Am. Br. 23-42) therefore err in contending that this case involves a limited public forum, *i.e.*, public property the government "has opened for use by the public as a place for expressive activity." *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). A limited public forum normally involves a facility that has been opened to the public generally, or to a class of individuals, in an environment that promotes unrestricted discussion in "the marketplace of ideas." *Widmar* v. *Vincent*, 454 U.S. 263, 267-268 n.5 (1981). The suggestion of respondents and their amici that a limited public forum is created whenever the government permits selective access to government property in connection with some type of expressive activity would swallow up the non-public forum category. See, *e.g.*, *Perry*, *supra* (school mailboxes); *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) (postal mailboxes); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (advertising panels).

tually every respect, and limited to a carefully selected group of beneficiaries. The government, acting in its capacity as employer, formulates Campaign policies and directs Campaign operations, and federal employees conduct all solicitation activities. Charities do furnish to the Campaign a limited amount of information about their activities. However, the Campaign clearly does not entail the sort of face-to-face fundraising activities by charities themselves that this Court has considered in the charitable solicitation cases on which respondents and their amici rely. See, *e.g.*, *Secretary of State* v. *Joseph H. Munson Co.*, No. 82-766 (June 26, 1984); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632 (1980).

Respondents are plainly wrong in suggesting (Br. 26-27 n.34, 30, 39; see also ACLU Am. Br. 26-31) that the Campaign has always been a "clearinghouse" that includes all sorts of charities, including advocacy groups. While it is true that the earlier written statements of Campaign eligibility criteria were not as precise as that contained in Executive Order No. 12,404, there is no question about the actual practice of the Campaign. Respondents do not contend that they or any other advocacy groups participated in the Campaign from its inception in 1961 through 1980; and the record is clear that when several respondents applied to participate in the Campaign in 1980 petitioner's predecessor rejected their applications on the ground that they did not provide direct health and welfare services. See Resp. Br. 7; *NAACP Legal Defense & Educational Fund, Inc.* v. *Campbell* (*NAACP I*), 504 F. Supp. 1365 (D.D.C. 1981). See also Appellees' C.A. Br. Addendum 64-65 (listing initial par-

ticipants in coordinated federal fundraising campaigns).[2]

Thus, as we explained in our opening brief (at 23-29), to the extent this case is properly subject to a "forum" analysis, it involves a nonpublic forum. See *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 46-47 (1983). As amici United Black Fund of America, et al., correctly point out (Br. 9-15), the Campaign is at bottom a set of activi-

[2] Respondents' repeated assertion that they were "expelled" from the Campaign as a result of Executive Order No. 12,404 is inaccurate. Respondents initially participated in the Campaign as a result of their own litigating efforts in *NAACP I*, in which the district court held that the then-existing written explanations of Campaign eligibility criteria were unconstitutionally vague. The officials who administered the Campaign admitted respondents and other advocacy groups in an effort to comply with the ruling in that case and to reduce the potential for further litigation (see J.A. 310). But during this period federal officials were considering ways in which the Campaign would be returned to its original scope through more precise definition of the eligibility criteria in response to the holding in *NAACP I* (*e.g.*, J.A. 71-82). The experience of the Campaign held in the fall of 1982 helped to persuade the administrators of the Campaign, and ultimately the President, that the Campaign should be limited to traditional health and welfare charities on a permanent basis.

Respondents portray petitioner's endorsement of regulations issued to govern the fall 1982 Campaign as evidence that federal officials voluntarily included advocacy groups in the Campaign (J.A. 84-87). See Resp. Br. 9; see also American Jewish Comm. Am. Br. 16-17. Petitioner's comments were made in the context of continuing experimentation in response to the constraints imposed by the decision in *NAACP I* and his responsibility to encourage enthusiastic participation in the Campaign. In any event, those statements surely did not preclude the President from determining that the Campaign should be restored to its original contours.

ties that make up a federal program. Many aspects of the Campaign (*e.g.*, the payroll deduction feature) do not involve any expressive activity, but are simply mechanisms that permit efficient functioning of the program. See Pet. Br. 29 n.22. And the expressive activity that arguably is involved in the Campaign[3] is considerably less extensive or direct than that involved in the use of the school mailboxes in *Perry*. The essential teaching of *Perry* is that any First Amendment analysis of restrictions on access to public property must be informed by the context in which the restrictions are imposed. The context of this case reveals that it is at the outer perimeter of the nonpublic forum category and that, to the extent there are any First Amendment interests at stake, they are significantly weaker than in *Perry* itself.

2. As we showed in our opening brief, limiting Campaign participation to traditional health and welfare charities is consistent with the requirements of

[3] Respondents appear to acknowledge (Br. 18, 19-20; see also American Jewish Comm. Am. Br. 8; ACLU Am. Br. 10-11, 15) that the only expressive activity by charities that occurs as part of the Campaign is the drafting of the 30-word descriptive statements that appear in the Campaign brochure distributed to federal employees. Those statements, which are subject to review by federal officials (see Pet. Br. 27), help federal employees decide whether they wish to contribute to the Campaign and whether to designate particular groups to receive their contributions. But nothing about the Campaign requires that there be descriptive statements or that they be drafted by the charities themselves; federal officials could determine to replace the descriptive statements with a bare list of participating charities or to assume the responsibility for preparing the statements. Thus, use of the 30-word statements should not be viewed as transforming the Campaign into the equivalent of traditional charitable solicitation activities.

the Constitution because it is both viewpoint-neutral and reasonable in light of the purposes served by the Campaign and the federal workplace. *Perry*, 460 U.S. at 46. Respondents do not seriously contend that the Campaign eligibility criteria are not viewpoint-neutral;[4] and their challenge to the President's judgment that the criteria serve the purposes of the Campaign and the workplace is unsuccessful.[5]

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[4] Respondents do suggest, time and again (Br. 25, 26-27, 29, 30, 32, 36, 39-40), that the distinction between traditional charities and advocacy groups is based on petitioner's views about what types of organizations are worthwhile. See also ACLU Am. Br. 8. But it was the President, not petitioner, who promulgated the eligibility criteria in Executive Order No. 12,404. More important, the criteria do not constitute an expression of any particular individual's personal views. The distinction between traditional charities and other types of groups has existed from the inception of the Campaign in 1961; federal officials responsible for administering the Campaign have recognized and implemented that distinction through six different Administrations. Indeed, two respondents initially challenged the Campaign eligibility criteria in *NAACP I* because officials of the Carter Administration rejected their applications on the ground that they were advocacy groups, rather than traditional health and welfare charities. See page 3, *supra*. To the extent any conception of "worthiness" underlies the Campaign eligibility criteria, it reflects only a general consensus that traditional charities are the most appropriate beneficiaries of charity drives conducted in the workplace.

[5] Respondents make a desultory effort (Br. 24) to support the court of appeals' purported distinction between a "reasonableness" standard and a "rational basis" standard. However, they cite no authority that indicates that this Court has recognized any substantive difference in these standards in the context of nonpublic forum cases. As we suggested in our opening brief (at 45-46), we believe there is no significant difference. Compare *Perry*, 460 U.S. at 49 (footnote omitted)

a. Common sense alone suggests that limitation of Campaign participation to traditional health and welfare charities does not offend the Constitution. As we explained in our opening brief (at 32-34), the Campaign resembles most employer-sponsored charity drives in its inclusion of traditional health and welfare charities and exclusion of advocacy groups. For example, drives conducted by well-established federated charities such as the United Way generally are limited to traditional charities.[6] And, as Judge Starr

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(touchstone for First Amendment analysis is whether distinctions "are reasonable in light of the purpose which the forum at issue serves"), with *id.* at 55 (under equal protection analysis "the State may draw distinctions which relate to the special purpose for which the property is used"). Moreover, respondents' suggestion that a "reasonableness" standard requires independent judicial scrutiny of the evidentiary support for the government's exclusionary actions is inconsistent with this Court's statements in *Perry*, 460 U.S. at 52 n.12.

[6] Respondents mislead the Court in suggesting (Br. 28) that the United Way has always included advocacy groups as beneficiaries of its charitable solicitation efforts. Respondents cite the testimony of a United Way representative that the United Way historically has supported advocacy activities. But that representative was simply expressing concern that Executive Order No. 12,404 might operate to exclude traditional health and welfare charities from participation in the Campaign if they spent any portion of their resources on advocacy services "for the purposes of furthering their health and welfare missions." *Executive Orders 12353 and 12404 As They Regulate the Combined Federal Campaign: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 98th Cong., 1st Sess. Pt. 1, at 250 (1983). The United Way representative referred not to groups like respondents, which exist for the purpose of litigating to further particular public policy goals, but to "settlement houses, family service agencies, public health organizations, and prisoner aid societies" (*ibid.*). The Office of Personnel Man-

noted, the notion that "the feeding of the hungry, the healing of the sick, and the educating of the ignorant" have a stronger "claim on the human conscience" than the activities of organizations engaged in the pursuit of policy goals has been "affirmed for over two thousand years" (Pet. App. 43a). The Campaign rests squarely within this longstanding and venerable tradition.[7]

Respondents urge (Br. 20, 22-32), however, that the distinction between traditional charities and advocacy groups cannot be reasonable because inclusion of advocacy groups in the Campaign is not "incompatible" with either the federal workplace or the purposes of the Campaign. See also ACLU Am. Br. 15-16, 24-25, 32.[8] In support of this "compatibility" ar-

agement responded to the concerns expressed by the United Way when it issued implementing regulations. See Pet. Br. 10 n.11.

[7] Respondents urge (Br. 27) that they should be regarded as traditional health and welfare charities because the litigation they undertake may lead to court orders that require provision of health and welfare services to individuals. See also American Jewish Comm. Am. Br. 15-16; NCRP Am. Br. 15-17; N.Y. State Am. Br. 18-19. But respondents do not purport to provide such services directly; nor do they state that they provide litigation services primarily on the basis of financial need. Moreover, respondents do not deny that they engage in advocacy activities, *i.e.*, that they "seek to influence * * * the determination of public policy through * * * advocacy, * * * or litigation on behalf of parties other than themselves." Exec. Order No. 12,404, § 1(b).

[8] Respondents and their amici contend vigorously that the relevant forum in this case is the Campaign, not the federal workplace. See Resp. Br. 19-20; NCRP Am. Br. 9-11; ACLU Am. Br. 14-21. We disagree. The Campaign itself is not a place, but rather a set of activities that occur in the federal workplace. Respondents would have little interest in having

gument, respondents cite the fact that the Campaign was created specifically to permit charitable solicitation activities in the federal workplace. Under respondents' view (see Br. 20), since it would be feasible to include 30-word statements about advocacy groups along with the statements about other organizations in the Campaign brochure, the First Amendment requires that advocacy groups be included as beneficiaries of the Campaign.

This Court did state in *Perry* that a nonpublic forum normally is limited to "activities compatible with the intended purpose of the property" (460 U.S. at 49). But that formulation hardly suggests that access to a nonpublic forum must be granted whenever it would be somehow feasible as a practical matter. Rather, the "touchstone" for evaluating distinctions in access to a nonpublic forum is "whether they are reasonable in light of the purpose which the forum * * * serves" (*ibid.* (footnote omitted)). The notion of "compatibility" therefore does not add any thing to the "reasonableness" standard under which we analyzed this case in our opening brief.

If respondents' "compatibility" argument were correct, it would yield two rather peculiar results. First, under that "compatibility" approach, a number of this Court's nonpublic forum cases would have turned out differently. For example, under respondents' view, the First Amendment would have required that the excluded union be given access to the school mail-

a 30-word description of their activities included in Campaign literature if that literature were not distributed in the workplace. But in any event, as we explained in our opening brief (at 23-24 n.18), we believe it makes little difference how the relevant forum is identified in this case, since any analysis of restrictions on access to a forum must take account of the context in which the forum exists.

boxes in *Perry*, because the facts that the excluded union previously had had access to the mailboxes and that certain civic groups and the union that served as the exclusive bargaining representative continued to have access would have indicated that access by the rival union was not incompatible with the purpose of the school mail system. Likewise, in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), the fact that commercial advertising was displayed in municipal transit vehicles would have established that political advertising was not incompatible with the forum.

Second, to the extent we understand respondents' conception of "compatibility," it appears to have no limiting principle. Under respondents' view, presumably any tax exempt organization must be admitted to the Campaign because it would be possible to include 30-word statements about each such organization in the Campaign brochure.[9] That approach would drain the *Perry* "reasonableness" standard of meaning.

b. Respondents insist (Br. 31-32) that this Court rejected any distinction between traditional charities

[9] This appears to be the thrust of respondents' argument, despite their protestations to the contrary (see Resp. Br. 41-42). Like the court of appeals (Pet. App. 21a, 25a-26a), respondents point out that both advocacy groups and groups eligible to participate in the Campaign have been granted tax exempt status under the provisions of the Internal Revenue Code. See Resp. Br. 32; see also NCRP Am. Br. 15-16. Neither respondents nor their amici suggest where the President could constitutionally draw the line on Campaign participation short of including all tax exempt groups. See also *Executive Orders 12353 and 12404 As They Regulate the Combined Federal Campaign, supra*, Pt. 2, at 144 (remarks of respondents' counsel Boris Feldman) (suggesting that first-come/first-served or lottery approach might be the only workable way to limit Campaign participation).

and advocacy groups in *Village of Schaumburg* v. *Citizens for a Better Environment*, *supra*. That case, of course, did not involve restrictions on access to a nonpublic forum. Rather, in *Village of Schaumburg* the Court was concerned with a governmental ban that directly affected expressive actions by advocacy groups, such as canvassing on public streets and from house to house. The Village contended that the ban was justified in order to prevent fraud and to protect public safety and privacy. The Court concluded that the ban on advocacy group activities was insufficiently related to the governmental interests asserted to justify its interference with protected speech. 444 U.S. at 635-639.

In this case, in contrast, there has been no attempt to prevent advocacy groups from engaging in their normal solicitation activities; the issue is whether they must be included as beneficiaries of a Campaign conducted by the government itself. Moreover, the activities at issue here take place not in the public streets, but in the federal workplace, where the government acts in its proprietary role as employer. Thus, both the effect on speech and the governmental interests at stake in this case are considerably different from those in *Village of Schaumburg*.

c. Respondents and their amici dispute the President's judgment that limiting the Campaign to traditional health and welfare charities serves the purposes articulated in Executive Order No. 12,404. But the objections they raise do not demonstrate that the President's judgment on this score was unreasonable.

Respondents fail to acknowledge the initial purpose of the Campaign stated in the executive order—lessening of the amount federal, state, and local governments must expend on social programs. Cf. ACLU Am. Br. 49-50. Since public funding of social pro-

grams normally is directed to the sorts of direct services provided by traditional health and welfare charities, rather than to, *e.g.*, the sorts of litigation or lobbying services provided by advocacy groups, encouraging federal employees to contribute to the traditional charities clearly serves this initial purpose.

Respondents attack the President's judgment that limiting the Campaign to traditional health and welfare charities will help to minimize disruption of the federal workplace and costs of the Campaign. See Resp. Br. 33-39. They state flatly (*id.* at 26 & n.33) that there is no evidence that recent inclusion of advocacy groups in the Campaign has created morale problems and diverted some federal employees from their normal duties. That statement is simply wrong; our opening brief (at 37-39) includes references to the record evidence supporting the President's judgment on this point. More important, this Court has made it clear that public officials need not establish an empirical basis for predictions about the likely effect of controversial speech in order to justify restrictions on access to a nonpublic forum. See, *e.g.*, *Perry*, 460 U.S. at 52 n.12. It was plainly reasonable for the President to conclude, as amici United Black Fund of America, et al., suggest (Br. 5), that, under the longstanding Campaign criteria, "[s]upport for the Campaign has been widespread because of the federal employees' confidence in the fact that their contributions were being used to fund traditional health and welfare agencies that operated without regard to politics or ideology." [10]

[10] Amicus State of New York represents (Br. 8, 10-13) that its recent inclusion of advocacy groups in its State Employees Federated Appeal has not caused any practical problems. While we are not in a position to question New York's extra-

Respondents also contend (Br. 36-39) that this Court's First Amendment precedents preclude restrictions of speech based on its controversial nature. See also NCRP Am. Br. 18; ACLU Am. Br. 50-51. Respondents disregard entirely the cases, cited in our opening brief (at 40), in which this Court has indicated that public officials may consider the potential

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record representations, we do note that New York's charity drive does not appear to include the full range of advocacy groups, including, *e.g.*, the National Right to Work Legal Defense Foundation. See N.Y. State Br. App.

Respondents suggest (Br. 30-31, 38-39) that inclusion of advocacy groups could not be controversial because such groups do not receive any Campaign funds unless an employee specifically designates a group to receive his contribution. The record indicates that this consideration does not prevent negative employee reactions to inclusion of advocacy groups. See J.A. 352-353, 362.

Respondents contend (Br. 10, 34-35) that the rate of employee participation increased from 64.7% to 67.65% between the 1982 (fall 1981) and 1983 (fall 1982) Campaigns. In response to a request from respondents' counsel, we have determined that certain estimation and keypunch errors (subsequently corrected by OPM) caused the percent participation figures on which respondents rely to be overstated. For example, we have identified a keypunch error for the local Campaign in Dubuque, Iowa that caused an overstatement of approximately 376,000 in the number of employees contributing to the 1983 (fall 1982) Campaign, which is reflected in the November 1983 document on which respondents rely. (That error is apparent on the face of the November 1983 printout, which shows an average Campaign contribution of two cents for Dubuque.) We have provided to respondents' counsel and lodged with the Clerk of the Court a letter containing an explanation of the errors reflected in the earlier figures, as well as updated and corrected employee participation figures, which show that employee participation fell from 60% in the 1982 (fall 1981) Campaign to 58% in the 1983 (fall 1982) Campaign.

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for controversy and disruption in determining the need for restrictions on access to a nonpublic forum.[11]

In addition, respondents reject the President's judgment that limiting the Campaign to traditional charities will preserve the reality and appearance of neutrality. See Resp. Br. 39-41; see also NCRP Am. Br. 19-20; ACLU Am. Br. 51-52. But it was surely not unreasonable for the President to determine that inclusion in the Campaign of advocacy groups, *i.e.*, groups that "seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves" (Exec. Order No. 12,404, § 1(b)), will detract to some extent from the appearance of neutrality in the federal workplace. See *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973). Respondents offer the assurance (Br. 41) that that problem can be readily solved by use of a disclaimer in the Campaign brochure. There is, of course, no guarantee that such a disclaimer would be seen by federal employees or that it could successfully

[11] Only by misrepresenting our position could respondents imply (Br. 36) that this case involves the question whether federal officials may exclude an individual group from the Campaign on the basis that some federal employees express opposition to the views of the group. As we made clear in our opening brief (at 40-41 n.32), we are not contending that federal officials may exclude individual groups from the Campaign in response to objections from federal employees. The question here is whether the President may differentiate among broad categories of organizations, based on various reasons, including the belief that inclusion of organizations in one category is more likely to engender controversy among federal employees and to jeopardize the success of the Campaign because of the nature of the activities of those organizations.

counter suspicions that inclusion of certain groups was in fact motivated by political considerations. Moreover, as we pointed out in our opening brief (at 42 n.34), any disclaimer included in Campaign materials would not be seen by those outside the federal workplace. In any event, this Court has declined to require public officials to employ such disclaimers as substitutes for restrictions on access in a nonpublic forum context. See *Lehman* v. *City of Shaker Heights*, 418 U.S. at 321-322 (Brennan, J., dissenting).[12]

d. We noted in our opening brief (at 44-45) that the fact that advocacy groups have alternative channels by which they can solicit contributions from federal employees supports the reasonableness of the Campaign eligibility criteria. Respondents and their amici insist that these alternative channels are wholly inadequate, since the Campaign is an especially efficient and inexpensive way for organizations to raise money. See Resp. Br. 43-44; ACLU Am. Br. 52-54; N.Y. State Am. Br. 14-16.

We do not dispute that charities that are included in the Campaign receive significant benefits, particularly in the form of reduced fundraising expenses. For example, federal employees carry out all solicitation activities on official time; government payroll offices arrange for automatic deduction of employees' contributions; and the government administers re-

[12] Respondents and their amici cite *Widmar* v. *Vincent*, *supra*, in support of their contention that the interest in neutrality does not support restriction of Campaign participation. But *Widmar* was a limited public forum case involving a university setting that the Court described as "the marketplace of ideas." 454 U.S. at 267 n.5. The interest in neutrality is clearly stronger in the context of the federal workplace.

porting requirements and compiles statistical data for the Campaign. Such activities, which involve substantial cost to the government and corresponding savings to participating charities, are akin to a federal subsidy. But respondents and other advocacy groups do not possess a First Amendment right to these special benefits. See *Regan* v. *Taxation With Representation*, 461 U.S. 540, 545-546 (1983); cf. *Harris* v. *McRae*, 448 U.S. 297, 316-318 (1980).[13]

There can be no doubt about the existence of alternative channels of communication through which respondents and other advocacy groups may reach federal employees. They are precisely the same channels the advocacy groups regularly use to reach all other potential donors who do not happen to be federal employees, including direct mailings, telephone contact, and media advertisements. The fact that advocacy groups do not participate in the Campaign in no way deprives them of any of these normal channels of communication.[14]

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[13] Respondents' contentions on this point suggest that they are less interested in communicating a message to federal employees than in the monetary advantages that accompany participation in the Campaign.

[14] Respondents (Br. 27, 29) and their amici (NCRP Am. Br. 20-21; American Jewish Comm. Am. Br. 20-24) therefore err in asserting that limitation of the Campaign to traditional health and welfare charities penalizes advocacy groups for their exercise of rights protected by the First Amendment, citing *NAACP* v. *Button*, 371 U.S. 415 (1963). Respondents' legal advocacy activities unquestionably are protected by the First Amendment. But unlike the situation in *Button*, the fact that respondents do not enjoy the benefits of Campaign participation does not inhibit or penalize their protected activities or interfere with their normal fundraising efforts in support of those activities. Compare, *e.g.*, *Harris* v. *McRae*, 448 U.S. at 316-318 & n.19; *Maher* v. *Roe*, 432 U.S. 464, 474 & n.8 (1977).

3. Respondents' basic complaint in this case is that, under the criteria established in Executive Order No. 12,404, some types of groups may participate in the Campaign, while others, including respondents and other advocacy groups, may not. Ultimately, then, this case boils down to a problem in line-drawing. There is no disagreement that a line must be drawn somewhere in defining Campaign participation. The court of appeals appears to have believed that the line should encompass all organizations that qualify for tax exempt status under 26 U.S.C. 501(c)(3). The President and those who have responsibility for administering the Campaign chose a different line—one that, consistent with the practice during the first two decades of the Campaign, encompasses the broad class of traditional health and welfare charities, but not the many other types of tax exempt organizations, such as opera guilds, animal welfare groups, churches, and advocacy groups. Although arguments can be made in support of the more inclusive approach favored by respondents and the court of appeals, the line drawn by the President is clearly a reasonable one in the context of the federal workplace and the Campaign and therefore satisfies First Amendment requirements.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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